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ИСПОЛЬЗОВАНИЕ РЕЗУЛЬТАТОВ ОПЕРАТИВНО-РОЗЫСКНОЙ
ДЕЯТЕЛЬНОСТИ В ДОКАЗЫВАНИИ ПО УГОЛОВНЫМ ДЕЛАМ

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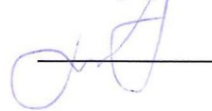
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ЗАДАНИЕ

по подготовке выпускной квалификационной
(магистерской) работы

студенту Мериуц Николаю Алексеевичу

Тема выпускной квалификационной (магистерской) работы: «Использование результатов оперативно-розыскной деятельности в доказывании по уголовным делам».

Утверждена: 05 сентября 2016 года.

Руководитель работы: доктор юридических наук, доцент Андреева Ольга Ивановна.

Сроки выполнения выпускной квалификационной (магистерской) работы:

1) Составление предварительного плана и графика написания выпускной квалификационной (магистерской) работы с «05» сентября 2016 г. по «08» сентября 2016 г.

2) Подбор и изучение необходимых нормативных документов, актов и специальной литературы с «09» сентября 2016 г. по «30» сентября 2016 г.

3) Сбор и анализ практического материала с «01» февраля 2017 г. по «10» апреля 2017 г.

Изучению подлежат рассмотренные Октябрьским и Ленинским районными судами г. Томска в 2012-2017 гг. уголовные дела о преступлениях, связанных с незаконным сбытом наркотических средств, дачей и получением взятки, в ходе которых осуществлялись оперативно-розыскные мероприятия.

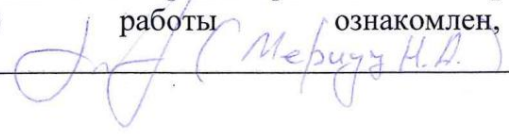
4) Обобщение практического материала с «10» апреля 2017 г. по «15» апреля 2017 г.

5) Составление окончательного плана выпускной квалификационной (магистерской) работы с «01» октября 2016 г. по «02» октября 2016 г.

6) Написание и оформление выпускной квалификационной (магистерской) работы с «03» октября 2016 г. по «10» мая 2017 г.

Встречи дипломника с научным руководителем – ежемесячно (последняя неделя месяца в часы консультаций).

Научный руководитель 

С положением о порядке организации и оформления выпускной квалификационной (магистерской) работы ознакомлен, задание принял к исполнению  Мериуц Н.А.

РЕФЕРАТ

В настоящее время преступность существенно меняет свое качество. Наблюдается повышение профессионализма, организованности и коррумпированности преступной среды, появляются новые способы совершения преступлений, используются современные достижения науки и техники. Все большую распространенность приобретает противодействие органам предварительного расследования со стороны причастных к преступному событию лиц. Поэтому существенно возрастает роль оперативно-розыскной деятельности в раскрытии и расследовании преступлений.

Стремясь преодолеть проблемную ситуацию, связанную с возрастающей сложностью установления обстоятельств преступного события, не следует забывать о том, что обеспечение прав, свобод и законных интересов участников уголовного процесса является столь же важной задачей, как и расследование преступления. Потребность в раскрытии и расследовании преступления, установление виновного лица не может служить основанием для снижения гарантий защиты прав и свобод лиц, вовлеченных в сферу уголовного процесса.

Учитывая объективную потребности практики в использование оперативно-розыскных возможностей при расследовании преступлений, существует необходимость развивать институт использования результатов оперативно-розыскной деятельности в доказывании по уголовным делам, не ослабляя при этом гарантий защиты прав его участников.

Структура магистерской диссертации обусловлена избранной темой исследования, поставленными задачами и состоит из введения, двух глав, включающих пять параграфов, заключения, списка использованной литературы и приложения.

Во введении обосновывается актуальность избранной темы исследования, определяется степень научной разработанности, предмет и объект исследования, его цели и задачи, а также теоретическая и практическая значимость исследования.

Глава первая «Правовые и теоретические основы использования результатов оперативно-розыскной деятельности в доказывании по уголовным делам» включает три параграфа.

В первом параграфе проводится историко-правовой анализ нормативного регулирования использования результатов оперативно-розыскной деятельности в доказывании по уголовным делам.

Во втором параграфе исследуются особенности оперативно-розыскной деятельности.

Третий параграф посвящен вопросам теории доказывания, на основе которой определяется соотношение доказательств и результатов оперативно-розыскной деятельности.

Глава вторая «Механизм использования результатов оперативно-розыскной деятельности в уголовно-процессуальном доказывании» включает два параграфа.

Первый параграф посвящен исследованию основных теоретических подходов о порядке использования результатов оперативно-розыскной деятельности в доказывании по уголовным делам, а также их реализации в практической деятельности.

Во втором параграфе проводится анализ основных проблем, связанных с использованием оперативной информации в доказывании, которые приводят к существенному снижению уровня гарантий защиты прав и свобод человека в уголовном процессе.

- В заключении подводятся итоги исследования.

В приложении отражено обобщение изученной практики.

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INTRODUCTION

Relevance of the research topic. The crime is a negative phenomenon that poses a serious threat to life and health, rights and freedoms of citizens, their property, interferes with the normal development of many state institutions. Currently crime is changing its quality significantly. There is an increase professionalism, organization and corruption of the criminal environment, new ways of committing crimes are emerging, modern achievements of science and technology. Increasing prevalence acquires opposition to the bodies of preliminary investigation from parties involved in the criminal event. Under these conditions, disclose crimes exclusively by criminal procedural means becomes a difficult and sometimes impossible task. That's why the role of operational-search activity (hereinafter - ORD) in the disclosure and investigation of crimes. By virtue of its predominantly covert nature, lack of detailed legal regulation of cognitive techniques and methods, as well as other features, this activity allows you to effectively obtain information about the circumstances of the crime and the persons who committed it, including conditions of active opposition from those involved in the crime persons.

As V.I. Zazhitsky, the problem of using results of operational-search activities in criminal proceedings is that, on the one hand, it is necessary to effectively use them in proving in criminal cases, when it is really necessary, and on the other hand, to prevent the displacement, substitution by them of criminal procedural evidence, to avoid uncritical acceptance of operational-search

information¹. In an effort to overcome the problematic situation associated with the increasing complexity of establishing the circumstances of a criminal event, we should not forget that ensuring the rights, freedoms and legitimate interests participants in the criminal process is as important as crime investigation. Need for disclosure and investigation crime, the identification of the guilty person cannot serve as a basis for reduction of guarantees for the protection of the rights and freedoms of persons involved in the criminal process.

Issues of using the results of operational-search activities in proving in criminal cases were considered in the works of B.T. Bezlepkina, R.S. Belkina, O.A. Vagina, Yu.P. Garmaeva, A.N. Gushchina, K.K. Goryainova, E.S. Dubonosova, E.A. Share, A.S. Zakotyansky, A.V. Zemskoy, VC. Znikina, V.I. Zazhitsky, P.A. Lupinskaya, V.M. Meshkova, A.G. Markushina, A.D. Nazarova, E.Kh. Pashaeva, M.P. Polyakova, V.L. Popova, V.A. Sementsova, A.V. Smirnova, S.A. Sheifer, A.Yu. Shumilov and a number of other scientists.

The works of these authors have made a significant contribution to the study of problems using the results of operational-search activities in proving on criminal cases. At the same time, their main focus was on as a rule, studying the possibility of using operational data in evidence to resolve the issue of guilt, increase efficiency investigation of crimes through operational-search activities.

Now we can observe that as a result of the desire to increase the effectiveness of the preliminary investigation through active involvement of operational information, protection issues have gone by the wayside human rights and freedoms in criminal proceedings. Significantly increases the number of complaints related to the use of the results of operational

¹ Zazhitsky V.I. The results of operational-search activity in criminal proceedings. Theory and practice / V.I. Zazhitsky. - St. Petersburg: Legal Center Press, 2006. P.184.

search activity in the criminal process, coming to various judicial bodies, including the Supreme Court of the Russian Federation and the Constitutional Court of the Russian Federation, European Court of Human Rights, which indicates the presence of a number of unresolved problems.

Considering the objective needs of practice in the use operational-search capabilities in the investigation of crimes, there is a need to develop the institution of using the results operational-search activity in proving in criminal cases, not while weakening the guarantees of protection of the rights of its participants.

The object of research is social relations, arising in the field of criminal proceedings, related to use in proving the results of the operational-search activities while respecting the rights and freedoms of participants in the criminal process.

The subject of the study is the legislation of the Russian Federations and investigative and judicial practice regarding the use results of the OSA in proving, decisions of the European Court of Human Rights human, as well as scientific theories devoted to the designated problem.

The purpose of the study is to identify a set of measures which, in their totality, ensure the effective use of the results of the OSA in proving in criminal cases, without violating legally guaranteed rights of participants in criminal proceedings.

To achieve this goal, the research was the following **tasks**:

- analyze the legal regulation of the use results of operational-search activities in proving criminal affairs;

- describe the operational-search activity, establish features of operational-search knowledge of the circumstances of the criminal developments;

-define	ratio	results	operational search
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activities and criminal procedural evidence;

- to study the main approaches regarding the order of use

operational information in evidence in criminal cases;

- analyze the similarities and differences between the operational-search

activities and criminal procedure activities;

- based on the analysis of practical activities, theoretical and

regulations, identify problems associated with the use

results of operational-search activity in proof.

- based on the results of the study, determine the ways of developing the practice and

regulations to ensure that the use of results

OSA in proving will not violate statutory rights

participants in criminal proceedings.

The methodological basis of the work is general scientific
(dialectical, systemic, historical methods, methods of analysis and synthesis)
and private (formal legal, comparative legal system
structural, descriptive-analytical, statistical methods, method
analysis of documents, generalization of investigative and judicial practice) methods.

The theoretical basis of the work was scientific works in the field,
criminal procedure law, criminalistics, theory of operational
search activity and other branches of scientific knowledge.

The normative base of the work was: the Constitution of the Russian
Federation, judgments and judgments of the European Court of Human Rights,
resolutions and rulings of the Constitutional Court of the Russian Federation,
resolutions of the Plenum of the Supreme Court of the Russian Federation, norms
current criminal procedure, operational-search and
criminal law, federal laws, ordinances
Government of the Russian Federation, regulations of departmental and interdepartmental
level.

The empirical basis of the study was the materials of 74 archival
criminal cases considered by the district courts of Tomsk in 2012-2017, and

also materials of 40 criminal cases that are publicly available on the website
<https://rospravosudie.com/>.

1 Legal and theoretical basis for using the results operational-search activity in proving in criminal cases

1.1 Regulation of the use of results operational-search activity in proving in criminal cases (historical and legal analysis)

At present, the role of units that carry out operational search activity, in the detection and disclosure of crimes, more and more increases. Decree of the President of the Russian Federation No. 683 dated May 12, 2015 "On the Strategy national security of the Russian Federation" noted that main threats to state and public security are, including the activities of terrorist and extremist organizations; activities of radical public associations and groupings; activities of criminal organizations and groups, associated with illicit trafficking in narcotic drugs and psychotropic substances, weapons, ammunition, explosives, organization illegal migration and human trafficking; activities related to using information and communication technologies for dissemination and propaganda of the ideology of fascism, extremism, terrorism and separatism, damage to the civilian world, political and social stability in society; criminal attacks, directed against a person, property, state power, public and economic security; corruption 2 . Opposition these negative phenomena that jeopardize the security of the country, requires active use of the capabilities of the operational-search activities. However, currently there is still the problem of using the results of the operational-search activity in proving in criminal cases.

²On the National Security Strategy of the Russian Federation: Presidential Decree. from 05/12/2015 No. 683 // Collection of legislation of the Russian Federation. – 01/04/2016. - No. 1 (part 2). - Article 212.

For the first time about operational-search methods of resolving criminal procedural tasks is mentioned in the previously secret Regulations of February 9 1907 "On security departments". R.S. Ryzhov in his dissertation study cites the following two norms from the said Regulation "On security departments" that are relevant to the use of operational information in the interests of criminal procedure:

- if the head of the security department received reliable information about an already committed criminal act by the state, he immediately reports this to the subject head of the gendarme department or his assistant, as well as prosecutorial supervision (paragraph 26 of the Regulation "On security departments");

- in case of initiation on the basis of detective information preliminary investigation or inquiry, head of the security department informs the officials producing such all available to him information, conforming the completeness of those with the interests of the fence internal agents and methods of activity of the department (paragraph 27 Regulations "On security departments")³.

Further regulation of the use of operational-search information in the criminal process is associated with the adoption of criminal procedural code of the RSFSR of 1923. In Art. 93 named regulatory of the legal act, there were indications of a covert check by the bodies of inquiry anonymous statements, after which they could serve as a pretext for initiating a criminal case⁴. Coming up in 1958 Fundamentals of Criminal Justice of the USSR and the union republics, in Art. 29 assigned to the bodies of inquiry taking the necessary operational-search measures in order to detect

³Ryzhov R.S. The use of the results of operational-search activity in the criminal process as a legal institution: diss. ... cand. legal Sciences / R.S. Ryzhov. - Nizhny Novgorod, 2004. P.17.

⁴On approval of the Code of Criminal Procedure R.S.F.S.R. (together with the "Criminal Procedure Code of the R.S.F.S.R.") // Izvestia of the All-Russian Central Executive Committee. - 02/18/1923. - No. 37.

signs of a crime and the persons who committed them . Named position
later reproduced in Art. 118 Criminal Procedure
Code of the RSFSR 1960

After analyzing the initial stage of legal regulation
use of the results of operational-search activities in the interests of
criminal process, we can conclude that the operational-search
activities and their results were used primarily to solve problems
stage of criminal proceedings. At the same time, rights issues
participants in criminal proceedings when using operational
information was not regulated in any way. Realizing efficiency promptly
investigative activities, the legislator sought through it to strengthen
opportunities for criminal procedure activities to identify,
prevention, suppression and investigation of crimes. Installing
rules for the use of operational information in the interests of criminal
procedural activities, no attention was paid to the creation of a system
guarantees that would not allow involvement in criminal procedure
proof of unreliable operational information would provide protection
rights and freedoms of citizens. On the contrary, the first regulations
regulating the use of the results of the operational-search activity in criminal procedure
activities are aimed solely at creating conditions
unhindered inclusion operational information in
evidence activity. In particular, the previously mentioned Criminal
procedural code of the RSFSR of 1923, providing for the possibility
initiate criminal cases on the basis of anonymous statements after a tacit
their checks, did not establish any safeguards against abuse
rights of officials. Establish the accuracy of the information
contained in such anonymous statements, as well as in the results of unspoken

⁵On the approval of the Fundamentals of Criminal Proceedings of the USSR and Union Republics:
Law of December 25, 1958 // Vedomosti of the Supreme Soviet of the USSR. - 1959. - No. 1. - Art. fifteen.

checks were not possible. In such a situation, a criminal case could be brought against any person, regardless of his participation in a criminal event.

Regulatory regulation of the use of the results of the operational activity for a long time time has not changed. Only in the early 1990s USSR Law of June 12, 1990 No. 1556-1, amended and additions to the Fundamentals of Criminal Proceedings of the USSR and the Union Republics⁶. The law now provides for the possibility of operational-search measures using video recording, filming and sound recordings in order to detect signs of a crime and persons, its perpetrators, identifying factual data **that may be used as evidence** in a criminal case after their checks in accordance with the criminal procedure legislation (Part 2, Article 29 of the Fundamentals of Criminal Proceedings of the USSR and the Union Republics)⁷. The named norm for the first time fixed an important direction of use results of the operational intelligence - the use of operational information in criminal procedural evidence. The adoption of the norm was objective. It was at this time, writes R.S. Ryzhov, - legal science recognized the existence of organized crime and the need to use special means of obtaining information about it⁸.

An important stage in the development of legal regulation of the use the results of the OSA in proving was the adoption on March 13, 1992 of the law "On

⁶Museev A.I., Tolstaya V.E. From the history of regulatory regulation of the use of the results of operational-search activities // Bulletin of the Kazan Law Institute of the Ministry of Internal Affairs of Russia. – 2015.- No. 2(20). - P.108.

⁷On the introduction of amendments and additions to the Fundamentals of Criminal Proceedings of the USSR and Union Republics: Law No. 1556-1 dated 12.06.1990 // Vedomosti SND USSR and USSR Armed Forces. - 1990. - No. 26. - Art. 495.

⁸Ryzhov R.S. The use of the results of operational-search activity in the criminal process as a legal institution: diss. ... cand. legal Sciences / R.S. Ryzhov. - Nizhny Novgorod, 2004. P.19.

operational-search activity in the Russian Federation”⁹ . Article 10 of this law established that the results of the operational-search activities can be used to prepare and implement investigative actions and carrying out operational-search activities to prevention, suppression and detection of crimes, as well as evidence in criminal cases after their verification in accordance with criminal procedure legislation¹⁰ . Thus, in the specified article was almost completely reproduced the provisions of Art. 29 Basics criminal proceedings of the USSR and the Union republics.

The provision of art. 10 of the law "On operational-search activities in Russian Federation" was subjected to significant criticism. Ability to use the results of operational-search activities directly as evidence in criminal cases after their checks contradicted the current criminal procedure legislation. "With a literal understanding of this prescription," wrote IN AND. Zazhitsky, - practical workers have the right to reason as follows way: if in the course of proof in a criminal case it is confirmed the reliability of the factual data obtained by the operational-search way, then all of them are evidence in the case under investigation. But such the conclusion is fundamentally wrong. The subject of verification in the course of proving data and materials obtained as a result of ORD, but evidence (Article 70 of the Code of Criminal Procedure of the RSFSR). When carrying out an operational-search activity, it is not evidence that is found, but traces of crimes”¹¹. Besides, scientists noted that the results of the ORD cannot directly

⁹On operational-search activity in the Russian Federation: Law No. 2506-1 dated March 13, 1992 (as amended on July 2, 1992) // Vedomosti SND RF and RF Armed Forces. - 04/23/1992. - No. 17. - art. 892.

¹⁰On operational-search activities in the Russian Federation: Law No. 2506-1 dated March 13, 1992 (as amended on July 2, 1992) // Vedomosti SND RF and RF Armed Forces. - 04/23/1992. - No. 17. - Art. 892.

¹¹Zazhitsky V.I. The results of operational-search activity in criminal proceedings. Theory and practice / V.I. Zazhitsky. - St. Petersburg: Legal Center Press, 2006. P. 184-185.

be used as evidence because there is no
procedural form of their collection¹² . According to E.A. Share of the provisions of art. ten
Law "On operational-search activity in the Russian Federation"
open wide opportunities for direct use
any results of operational-search activities as
evidence in criminal proceedings, bypassing the criminal procedure
procedure of the process of proof¹³ .

Further development of the idea of using the results of the ORD in
proof received in the new federal law of August 12, 1995 No. 144-
Federal Law "On operational-search activity" (hereinafter - the Federal Law on OSA), which
ruled out a provision equating the results of the operational-search
activities and evidence and, accordingly, ruled out the possibility
direct use of the results of operational-search activities in
as evidence in criminal cases. According to part 2 of Art. 11 Federal Law on OSA
the results of the operational investigation can be used in proving in criminal cases in
in accordance with the provisions of the criminal procedure legislation of the Russian
Federation governing the collection, verification and evaluation of evidence¹⁴ . Except
In addition, the Federal Law on OSA contains provisions on the procedure for presenting results
operational-search activity in the criminal process (part 4 of article 11 of the Federal Law on
ORD).

However, after the entry into force of the Federal Law on OSA, the Plenum of the Supreme Court
RF October 31, 1995 issues Resolution No. 8 "On Certain Issues
application of the Constitution of the Russian Federation in the implementation
justice", in which it indicates that the results of the operational-search
measures related to the restriction of the constitutional rights of citizens to
secrecy of correspondence, telephone conversations, postal, telegraphic and other

¹² Theory of evidence in the Soviet criminal process / otv. ed. N.V. Zhogin [i dr.]. - M.: Yurid.lit., 1973. S.272-273.

¹³ Share E.A. Formation of evidence based on results promptly
search activity: monograph / E.A. share. - M.: Prospekt, 2015. S. 223-224.

¹⁴On operational-search activity: Feder. Law of August 12, 1995 No. 144-FZ (as amended.
dated 07/06/2016) // Collection of legislation of the Russian Federation. - 14.08.1995. - No. 33. - art. 3349.

messages, as well as with penetration into the dwelling against the will of those living in persons (except in cases established by federal laws), may be used as evidence in criminal cases only when they are obtained under the permission of the court to hold such events and checked by the investigating authorities in accordance with the criminal procedural legislation (p.14)¹⁵ .

As we see, in its clarification, the Plenum of the Supreme Court of the Russian Federation used the wording of Art. 10 of the law "On the operational-search activities in the Russian Federation", i.e. a law that is no longer acted. Such an explanation of the Plenum of the Supreme Court of the Russian Federation contradicts not only the current criminal procedure law, as well as the new Federal Law on OSA that came into force at that time, since the court again equalized the results of the ORD and the evidence, which indicates the lack of a clear understanding of the ratio evidence and results of the ORD.

Undoubtedly, the Federal Law on OSA, adopted in 1995, should be considered in as the next stage in the development of legal regulation of the use results of operational-search activity in criminal proceedings. Edition of Art. 11 of the Federal Law on OSA is more perfect than the provisions article 10 of the law "On operational-search activities in the Russian Federation" and does not contradict the current theory of evidence and norms of criminal procedure law. But this does not mean that with the adoption of this law, the problem of legal regulation of the use results of the OSA in proving has been resolved in an exhaustive manner.

It seems that the issues of using the materials of the ORD in evidence in criminal cases must be decided on the basis of the norm of criminal

procedural code of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation), since it is this

¹⁵ On some issues of the application by the courts of the Constitution of the Russian Federation in the administration of justice "[Electronic resource]: resolution of the plenum of the Supreme Court of the Russian Federation of October 31, 1995 N 8: (as amended on 03/03/2015) // ConsultantPlus: ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

normative act regulates criminal procedure activity. From Art. one

Code of Criminal Procedure of the Russian Federation follows that the Federal Law on OSA to the sources of criminal procedure right does not apply. This circumstance was also pointed out by the Constitutional Court RF in its Definition of June 23, 2015 N 1507-O¹⁶.

It should be noted that in the criminal procedural legislation, the norm regulating the use of the results of the OSA in proving, for the first time appeared in the Code of Criminal Procedure of the Russian Federation of December 18, 2001 No. 174-FZ. Article 89 of the Criminal Procedure Code of the Russian Federation establishes: "In the process of proving it is prohibited to use the results of operational-search activities, if they do not meet the requirements for evidence by this Code"¹⁷. This formulation has been predominantly negative ratings. E.A. Share notes that the literal interpretation of the said norms actually excludes the possibility of using the results of the OSA in evidence in a criminal case, since the results of the operational circumstances cannot meet all the requirements for evidence in criminal proceedings¹⁸. A.G. Markushin spoke on this occasion as follows: "This rule has not yet been canceled, I think only because it does not carry any legal burden, no regulatory performs no legal function. It can be said in a legal sense completely incompetent and simply not needed by anyone, except, perhaps, individual commentators who interpret it in their own way.

¹⁶On the refusal to accept for consideration the complaint of citizen Gusak Alexander Yuryevich about the violation of his constitutional rights by paragraph 8 of the first part of Article 6, Article 7 and paragraph 1 of the first part of Article 15 of the Federal Law "On Operative Investigative Activities" [Electronic resource]: determination of the Constitutional Court of the Russian Federation dated June 23, 2015 N 1507-O // ConsultantPlus: Ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

¹⁷ Criminal Procedure Code of the Russian Federation: Feder. law of 18 Dec. 2001 No. 174-FZ (as amended on April 3, 2017) // Collection of Legislation of the Russian Federation. - 24.12.2001. - No. 52 (part I). - Art. 4921.

¹⁸ Share E.A. Formation of evidence based on results promptly search activity: monograph / E.A. share. - M.: Prospekt, 2015. P.235.

There were no clear legal instructions on the fate of the results of the operational-search activity, and there are still no¹⁹ .

It should be noted that back in 2000, when discussing at the international scientific-practical conference of the project of the future of criminal procedural law stated that the provisions of the draft concerning procedural conditions for the use of materials of the operational-search activities in the criminal process, were the key problem to be special study in the Legislation Committee of the State Duma of the Federal Assembly of the Russian Federation²⁰ . However, this question and was not properly worked out by the legislator. Since the adoption

Code of Criminal Procedure of the Russian Federation of December 18, 2001 No. 174-FZ and to the present, the provision of Art. 89 Code of Criminal Procedure RF remains unchanged.

However, there are also positive aspects of consolidating this legal status. First of all, it should be understood that, despite the prohibitive nature of Art. 89 Code of Criminal Procedure of the Russian Federation legislation establishes the possibility of using the results operational-search activity in proving in criminal cases.

By means of this norm, the Criminal Procedure Code of the Russian Federation established that evidence and the results of the operational-search activity of the concept are not identical.

At the same time, the possibility of using the results of the ORD in proving is put depending on compliance with the requirements of the Code of Criminal Procedure of the Russian Federation, regulating collection, verification and evaluation of evidence (i.e. from compliance with the procedural form) ²¹ .

Other problem criminal procedure regulation
use of the results of the ORD in evidence is associated with the presentation

¹⁹Markushin A.G. Legal support of operational-investigative activity in proving [Electronic resource] // ConsultantPlus: reference. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

²⁰Ananyin A. The draft Code of Criminal Procedure requires serious revision // Russian Justice. - 2000. - No. 10. - P.4-6.

²¹Alekseev A.I. Commentary on the Federal Law of the Russian Federation "On operational-search activity" / A.I. Alekseev, V.S. Ovchinsky. – M.: Prospekt, 2013. P.91.

results of the OSA to authorized officials. criminal
the procedural code of the Russian Federation does not contain proper legal regulation
submission of any evidentiary material to the criminal
process. "Neither theory nor practice," points out A.R. Belkin - did not work out
special procedural rules for the presentation of evidence, is not given in
law and the name of the protocol, which, logically, should be drawn up when evidence
is presented"²² .

It should be noted that Article 86 of the Criminal Procedure Code of the Russian Federation gave the right to represent
written documents and items to be attached to the criminal case
only the suspect, the accused, as well as the victim, civil
plaintiff, civil defendant and their representatives. Code of Criminal Procedure does not contain
noma, which would allow, on an initiative basis, operational-search
bodies to submit to the investigator (inquirer), in the production of which
there is an already initiated criminal case, the results of the ORD. In this regard, in
in the legal literature, there is an opinion that the results of the ORD
must be submitted to the criminal process at the initiative of the persons conducting
the criminal prosecution²³ . Thus, the current Code of Criminal Procedure of the Russian Federation
establishes the order in which the investigator (inquirer), within the framework of the
initiated criminal case must independently claim
the results of the ORD that are of interest to him or send an instruction to conduct
operational-search activities (hereinafter - ORM).

On the availability of the right of operational-search bodies to represent
the results of the OSA in the criminal process can be judged on the basis of the provisions of the Federal Law
about the ORD. According to Art. 11 of the Federal Law on operational-investigative activities, the results of the operational-search
activities may be submitted to the body of inquiry, the investigator or the court.

²²Belkin A.R. Theory of proof in criminal proceedings / A.R. Belkin. – M.: Norma, 2005. S. 145-146.

²³ See, for example: Kalugin A.G. The use of data obtained in the course of operational-search activities in the process of proving in a criminal case: a study guide / A.G. Kalugin, I.E. Ermolaev. - Krasnoyarsk: Siberian Law Institute of the Ministry of Internal Affairs of Russia, 2009. P. 20; Ryzhov R.S. The use of the results of operational-search activity in the criminal process as a legal institution: diss. ... cand. legal Sciences / R.S. Ryzhov. - Nizhny Novgorod, 2004. P. 145.

At the same time, as we have already indicated, the Federal Law on OSA is not normative act that regulates criminal procedure relation. We believe that this gap in legal regulation should be eliminate. In the Code of Criminal Procedure of the Russian Federation, it is necessary to fix the rules that authorize operational-search bodies on their own initiative to represent the results of the search warrant to the investigator (inquirer), in the production of which there is an initiated criminal case, as well as to establish the obligation investigator (inquirer) to consider such materials and take an advising solution.

With regard to the procedure for presenting the results of the operational-search activity, then neither the Federal Law on OSA nor the Code of Criminal Procedure of the Russian Federation resolve this issue. AT in the most general form, the procedure for presenting the results of the ORD is determined by Part 4 Art. 11 FZ about OSA. According to this norm, the presentation of results operational-search activity to the body of inquiry, investigator, to the tax authority or to the court is carried out on the basis of a decision head of the body carrying out operational-search activities, in the manner prescribed by departmental regulations. So departmental normative act is the Order of the Ministry of Internal Affairs of Russia N 776, Ministry of Defense of Russia N 703, FSB of Russia N 509, FSO of Russia N 507, FCS Russia N 1820, SVR Russia N 42, Federal Penitentiary Service of Russia N 535, Federal Drug Control Service of Russia N 398, IC of Russia N 68 dated September 27, 2013 "On approval of the Instructions on the procedure presenting the results of operational-search activities to the body inquiry, to the investigator or to the court" (hereinafter referred to as the Instruction).

According to clause 8 of the Instructions on the procedure for presenting results operational-search activity to the body of inquiry, investigator or to the court The procedure for presenting the results of the ORD includes:

- 1) Consideration of the need to declassify information, constituting a state secret contained in the submitted ORD results, and their carriers.

- 2) Registration of necessary documents:

- a) Decree to provide results promptly search activity.
 - b) Report (message) on the discovery of signs of a crime or a report on the results of the ORD.
 - c) Resolution of the head of the body carrying out the operational-search activity on declassification of information constituting a state secret.
- 3) The actual transfer of the results of the ORD²⁴ .

The adoption of the interdepartmental Instruction was a significant step in development of normative regulation of the use of the results of the operational evidence in criminal cases. First, given in interdepartmental Instructions, the provisions once again confirm the conclusion about that the results of the OSA are directly in evidence cannot be used in criminal proceedings. Secondly, in Interdepartmental Instructions formulated requirements for the results of the ORD, which will allow them to be used in proving criminal cases, taking into account the requirements of the criminal procedure law (p. 20 Instructions).

After analyzing the legal acts regulating the use of operational-search materials in proving should be conclude that the current legal basis for the use the results of operational-search activity needs to be proved improvement and proper consolidation in the criminal procedure legislation. It is obvious that the procedure for using the results of the ORD in evidence in criminal cases should be enshrined in the norms of criminal procedural code of the Russian Federation, since it is this normative act regulates social relations in the field of criminal justice, in

²⁴On approval of the Instructions on the procedure for presenting the results of operational search activities to the body of inquiry, the investigator or the court [Electronic resource]: order of the Ministry of Internal Affairs of Russia N 776, the Ministry of Defense of Russia N 703, the FSB of Russia N 509, the FSO of Russia N 507, the Federal Customs Service of Russia N 1820, the Foreign Intelligence Service of Russia N 42, Federal Penitentiary Service of Russia N 535, Federal Drug Control Service of Russia N 398, Investigative Committee of Russia N 68 dated September 27, 2013 (Registered in the Ministry of Justice of Russia on December 5, 2013 N 30544) // Rossiyskaya Gazeta. – 13.12.2013. - No. 282.

including relationships of evidence. However, the only rule

Code of Criminal Procedure of the Russian Federation, which is devoted to the issue of using the results of the OSA in proof, is formulated in such a way that, with its literal

interpretation, it can be concluded that the results of the OSA cannot be used in evidence. At present, the CPC

The Russian Federation does not contain specific prescriptions regarding the procedure using the results of the ORD in proving. To define it

the law enforcer has to interpret the whole complex

criminal procedure, as well as operational-search rules. Absence

a clear position of the legislator inevitably creates a number of difficulties in practical activities. Need to improve criminal

procedural law to ensure rational use

forces and means of operational-search activity. To this end, our

opinion, it is necessary to provide for norms in the Code of Criminal Procedure of the Russian Federation that would regulate the procedure for using the results of the ORD in proving, namely:

- consolidated the right of operational-search bodies to provide

the results of the operational-search activity (at the moment, the existence of such a right has to be judged based on the norms of the Federal Law on OSA, however, this regulatory act does not regulate

social relations in criminal

legal proceedings);

- established the obligation of the preliminary investigation bodies

consider the submitted operational materials and take on them

appropriate procedural decision;

- clearly determined the ratio of the results of the ORD and evidence;

- determined the mechanism of use in evidentiary activity

information obtained by investigative means.

1.2 Operational-search activity as a way of knowing crime events

Activities related to establishing the circumstances of the committed crime is carried out not only within the framework of the criminal process.

Cognition of the crime event due to other special types of cognition goes beyond the scope of criminal procedure. So, according to Article 2 Federal Law on operational-investigative activities to the tasks of operational-search activities, in particular, detection, prevention, suppression and disclosure of crimes, as well as the identification and identification of persons preparing them, committing or committed 25 .

In accordance with Article 1 of the Federal Law on operational-search activity, operational-search activity - type of activity carried out overtly and covertly by operational subdivisions of state bodies, within their powers through the implementation of operational-search activities in order to protect life, health, rights and freedoms of man and citizen, property, ensuring the security of society and the state from criminal encroachments²⁶ .

Analysis of this definition allows us to highlight the features operational-search activity:

1) Operational-search activity has an exclusively state-legal character²⁷ . Only the state, through its organs, has the right to carry out operational-search activities. Wherein the legal framework for such activities, as well as a list of bodies empowered the right to carry out an operational-search activity are clearly defined by the operational-search legislation. In accordance with Art. 13 of the Federal Law on OSA in the territory

²⁵ On operational-search activity: Feder. Law of August 12, 1995 No. 144-FZ (as amended. dated 07/06/2016) // Collection of legislation of the Russian Federation. - 14.08.1995. - No. 33. - Art. 3349.

²⁶ On operational-search activity: Feder. Law of August 12, 1995 No. 144-FZ (as amended. dated 07/06/2016) // Collection of legislation of the Russian Federation. - 14.08.1995. - No. 33. - Art. 3349.

²⁷ Rushailo V.B. Fundamentals of operational-search activity: Textbook for law schools / V. B. Rushailo. - St. Petersburg. : Lan, 2002. S. 148-152.

Russian Federation the right to carry out operational-search activities are provided to operational units: bodies internal affairs of the Russian Federation, bodies of the federal security service, federal body of state protection, customs authorities, foreign intelligence of the Russian Federation, the federal service for the execution of punishment. List of organs carrying out operational-search activities, may be changed or supplemented only by federal law (part 3 of article 13 of the Federal Law on OSA).

2) Operational-search activity is carried out through carrying out operational-search activities. Under ORM understand actions enshrined in the Federal Law on OSA or a set of actions, within the framework of which use overt and covert forces, means and methods, aimed at solving the tasks of the ORD²⁸. Exhaustive list promptly search activities is enshrined in Article 6 of the Federal Law on OSA.

3) Operational-search activity can be carried out in public and informal forms. Under the publicity of operational-search activities it is necessary to understand the conduct of operational-search activities, content, goals, the participants of which do not hide either from others or from objects of their implementation. Secrecy, on the other hand, means non-obviousness, secrecy of ongoing operational-search activities from persons not participating in them, including from employees of operational departments of state bodies, even if they have appropriate access, but above all - from the objects (persons, groups, organizations) in respect of which they are carried out²⁹.

4) Operational-search activity is carried out to achieve purpose, legislatively formulated in the Federal Law "On the operational-search activities". In Art. 1 of the Federal Law on OSA provides that the operational-search

²⁸Vagin O.A. Operative-search measures and the use of their results: educational and practical manual / O.A. Vagin, A.P. Isichenko, G.Kh. Shabanov. - M.: Shumilova I.I. Publishing House, 2006. P.5.

²⁹Goryainov K.K. Theory of operational-search activity: Textbook / K.K. Goryainova, V.S. Ovchinsky, G.K. Sinilova. - M.: INFRA-M, 2006. P.7.

activities are carried out in order to protect life, health, rights and freedoms of a person and a citizen, property, ensuring the security of society and the state from criminal encroachments³⁰ .

To define an activity as an operational-search activity, it is necessary the totality of all signs provided for by the Federal Law on OSA. Lack though one of them does not allow us to characterize the activity as an operational search, and may indicate a different type of activity, not prohibited by law, or about actions prohibited by law (for example, abuse of power, abuse of office authority).

The role and social significance of operational-search activities due to the wide potential use of its results in solving various problems, including the problems of criminal legal proceedings. Operational-search activity with its inherent forces and methods is an effective means of identifying, detecting signs of a crime, prevention, suppression and disclosure crimes, as well as the identification and identification of persons preparing them, doing or having done. At the same time, the disclosure of many crimes (e.g. drug trafficking, corruption, terrorist acts, crimes committed by criminal communities, etc.) without the involvement of operational-search bodies is almost impossible³¹ .

E.A. Oshlykova, based on the analysis of investigative and judicial practice, came to the conclusion that even if procedural means reveal

³⁰On operational-search activity: Feder. Law of August 12, 1995 No. 144-FZ (as amended. dated 07/06/2016) // Collection of legislation of the Russian Federation. - 14.08.1995. - No. 33. - art. 3349.

³¹Koryakovtsev V.V. Using the results of operational-search activity in proving in criminal cases related to organized criminal activity. Bulletin of the Nizhny Novgorod University named after N.I. Lobachevsky. Right. -2003. - #2.- S.313-321; Smirnova E.A. The use of information obtained as a result of the OSA to form evidence in cases of copyright infringement on computer programs and databases // Bulletin of the Russian Customs Academy. - 2008. - No. 2 (3). - 138-142; Kudryavtsev A.V., Nasyrov R.R. Using the results of operational-search activities in the investigation of criminal cases of murders committed for hire // "Black holes" in Russian legislation. - 2015. - No. 1. - P.91-96.

drug dealer, you can get information about drug delivery organizers and leaders of a criminal group by procedural means is practically impossible, in connection with which the use of the results of operational-search activities in the criminal process is an objective necessity³².

Conducted by E.A. Oshlykova, a survey of prosecutors showed that 99% of the respondents consider it necessary to use the results of operational-search activities in proving criminal cases³³.

AT

connection with this V.I. Zazhitsky rightly notes that to disclose many grave and especially grave non-obvious crimes, crimes, committed by organized groups and criminal communities, is possible only through the use of a complex of operational-search and criminal procedure means³⁴. Use of the results of the ORD in evidence in criminal cases is an objective necessity for investigating authorities.

We should agree with the statement of E.A. share, which indicates that The basis of all operational-search activity is the process of cognition³⁵. Operational proof is a special case application of the theory of knowledge in the interests of achieving the goals and objectives of before investigative activities. It permeates her being system forms the development of its content and form in all its manifestations, from the moment of its inception in its simplest forms to

³²Oshlykova E.A. Methods of investigating the illegal sale of narcotic drugs and maintaining public prosecution in criminal cases of this category: monograph / E.A. Oshlykov. – M.: Yurlitinform, 2013. S. 72.

³³Oshlykova E.A. Methods of investigating the illegal sale of narcotic drugs and maintaining public prosecution in criminal cases of this category: monograph / E.A. Oshlykov. – M.: Yurlitinform, 2013. S. 73.

³⁴Zazhitsky V.I. The results of operational-search activity in criminal proceedings. Theory and practice / V.I. Zazhitsky. - St. Petersburg: Legal Center Press, 2006. P.2.

³⁵Share E.A. Formation of evidence based on results promptly search activity: monograph / E.A. share. – M.: Prospekt, 2015. S. 11.

mature, transforming into other qualities forms"³⁶ . Both the criminal process and operational-search activity is a kind of cognitive process, - V.A. Sementsov and V.Yu. Safonov³⁷ .

Criminal-procedural and operational-search activities are specific forms of obtaining knowledge about a criminal event³⁸ . Knowledge in criminal proceedings has a number of difficulties, since the crime becomes known much later, interested persons hide its traces, means of knowledge are limited the law and the terms that are provided for the production of preliminary investigation. The circumstances of the crime are always events of the past, in this raises the problem of exact reconstruction of the event crimes. The importance of operational-search information for criminal process is connected with the peculiarities of operational-search activity, increasing its cognitive capabilities in comparison with criminal procedural evidence. These features should include:

1) The possibility of direct perception by employees

operational units of the crime event³⁹ . In criminal procedural proof, such knowledge is impossible, due to the fact that investigator (inquirer) deals with traces of what has already happened crimes. Criminal Procedural Evidence is knowledge of past events, carried out mainly indirectly. For clarification of the circumstances of the criminal case, reflections are used

³⁶Znkin V.K. Scientific foundations of operational-search support for the disclosure and investigation of crimes: diss. ... doc. legal Sciences / V.K. Znkin. - Nizhny Novgorod, 2006. P.117.

³⁷Sementsov V.A. Legal prerequisites and stages of implementation of the results of operational search activities in pre-trial proceedings: Monograph / V.A. Sementsov, V.Yu. Safonov. - Yekaterinburg: Ural State Law Academy, 2006. P.37.

³⁸ Spiridov P.E. On the epistemological aspect of operational-search activity. // Bulletin of St. Petersburg University of the Ministry of Internal Affairs. - 2005. - No. 4 (28). - S. 196-197.

³⁹Kaats M.E. The use of operational-search information in criminal proceedings: diss. ... cand. legal Sciences / M.E. Kaatz. - Ufa, 2008. S. 107-108; Share E.A. Formation of evidence based on the results of operational-search activities: monograph / E.A. share. – M.: Prospekt, 2015. S. 14.

criminal event and its consequences in the minds of people and on material objects⁴⁰. On the contrary, within the framework of operational-search activities employees of operational units have the opportunity to directly perceive criminal acts. Knowledge of the circumstances of the crime the real space and time in which they exist and develop in reality, provides great opportunities for prevention, suppression and detection of crimes compared criminal procedure activity. Immediate operational investigative knowledge is carried out, in particular, in the production of such ORM as observation, test purchase, operational experiment. This feature of operational-search activity makes it possible identify information about the crime, which criminal procedure almost impossible to obtain.

2) The possibility of carrying out operational-search knowledge in conditions of conspiracies.

Operational-search legislation establishes that the OSA is based on the principles of secrecy, use of overt and covert methods and means. By its meaning the principle of secrecy for operational-investigative activities is fundamental. This is pointed out by many authors dealing with the issues of operational-search activity⁴¹. Under cover in relation to operational-search knowledge, it is understood to mean the preservation in the secret of the forces, means and methods of cognition, organizational and tactical features of its implementation. Under conditions of secrecy, secrecy of conducted ORM, subjects carrying them out, encryption purposes of the ORM. Cognition of a crime in conditions of conspiracy

⁴⁰Bulatov B.B. Criminal procedure: a textbook for universities / B.B. Bulatov, A.M. Baranov. - 4th edition revised. and additional – M.: Yurayt, 2014. ý138.

⁴¹ See, for example: Dubonosov E.S. Operational-search activity: a textbook for universities / E.S. Dubonosov. - M.: Yurait Publishing House, 2012. P. 78; Markushin A.G. Operatively search activity: a textbook for universities / A.G. Markushin. - M.: Yurait Publishing House, 2012. S. 50-51; Remizov M.V. Operational-search activity: legal regulation and use of results in criminal proceedings / M.V. Remizov, R.N. Lastochkin. - Yaroslavl: Publishing House of the Yaroslavl State University. 2007. S. 7-9.

increases its effectiveness due to the fact that the covert conduct of ORM allows, upon obtaining the necessary information, to effectively overcome various kinds of opposition from the persons involved in the crime.

3) Lack of detailed legal regulation of cognitive techniques and methods of operational-search activity. This feature of operational-investigative knowledge is evaluated in the legal literature from two points of view:

a) On the one hand, due to the lack of legal regulation cognitive techniques and methods of operational-search activity, it is necessary to pay great attention to verifying the reliability of operational search information⁴². S.A. Schaefer noted in this regard that the ways receipt of operational-search information do not depend on the form, established by the criminal procedure law on the methods of cognition, as a result, the results obtained are always less reliable, than results obtained through procedural means⁴³. S.D. Averkin in his queue naturally indicates that the need for strict adherence the requirements of the criminal procedure law, the implementation of the entire procedure and its individual elements in the procedural form - the most important guarantee objectivity in collecting evidence, establishing all the circumstances in a criminal case, observing the rights and freedoms of a person and a citizen⁴⁴.

The question of the reliability of the ORD formed on the basis of the results evidence is associated with the peculiarity of techniques, methods, forces and means obtaining operational-search information, with the peculiarity of legal

⁴²Muzhenskaya N.E. A guide for investigators and interrogators on the investigation of certain types of crimes: in 2 parts / N.E. Muzhenskaya, G.V. Kostylev. - M.: Prospect, 2013. - Part 1. - P.393; Meshkov V.M., Strict N.V. Obtaining criminalistically significant information about drug trafficking by the operational-search method // Narcocontrol. - 2008. - No. 3. - P.33.

⁴³Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. - M.: Norma, 2009. S. 46.

⁴⁴Averkin S.D. Using the results of security measures carried out in a correctional institution in the investigation of crimes: dis. ... cand. legal Sciences. / S.D. Averkin. - Lyubertsy, 2009. P.90.

regulation of this activity. The Federal Law on OSA does not regulate in detail production of operational-search measures, in contrast to the criminal procedural code of the Russian Federation, which fixes in detail the procedure investigative actions and directly regulates

cognitive methods. So, for example, according to Art. 189 of the Code of Criminal Procedure of the Russian Federation during interrogation it is forbidden to ask leading questions. In Art. 180 Code of Criminal Procedure established the rule that all actions are described in the inspection protocols investigator, as well as everything discovered during the inspection in the order in which the examination was carried out and in the form in which the discovered observed at the time of inspection and examination. In the protocols list and describe all items seized during the inspection. Article 170

The Criminal Procedure Code of the Russian Federation determines what investigative actions must be carried out with the involvement of witnesses or with the use of technical means fixing the course and results of the investigative action. Regulation of receptions cognition provides the same result of cognition for all subjects (which allows you to develop a methodology of cognition, abstracting from the subjects)⁴⁵.

At the same time, it should be understood that there is no direct correlation between the reliability data from the procedural form of their receipt. In legal literature rightly note that the procedural form cannot be considered as the only guarantee of the reliability of the evidence obtained⁴⁶. It's in

in turn, suggests that by involving operational information in

evidence in a criminal case, one should also be guided by other

(non-procedural) rules to ensure credibility

received information. In particular, in each particular case, the investigator (investigator), forming evidence using the results of the operational search should, strive to establish primary sources of information and extract

⁴⁵Selina E.A. The conceptual meaning of the list of types of evidence in criminal process of the Russian Federation // Russian investigator. - 2016 - No. 19. - P.16.

⁴⁶Lazareva V.A. Evidence in criminal proceedings: a textbook for undergraduate and graduate students / V.A. Lazarev. - M.: Yurayt Publishing House, 2016. P. 64; Tomsinov V.A. Legal grounds for the reliability of evidence / V.A. Tomsinov. - M.: Zertsalo, 2011. C.2.

meaningful information from the primary source, since the derivatives sources of information always carry a certain distortion of the original information⁴⁷ .

For this reason, we believe it is unacceptable form evidence by interrogating an operative officer, who gives evidence from the words of an unspoken agent. In this case we will get unverifiable information, because due to the secrecy of the agent there is no the ability to establish whether it really exists, to investigate it identity, perform other verification actions to confirm information. The investigator (inquirer) must interrogate the person who directly perceived the facts relevant to the criminal affairs.

In turn, the operational-search authorities must ensure obtaining a sufficient set of operational-search data. Such the totality of data should allow the formation of evidence that confirm each other, make it possible to assess the reliability provided data, make sure that there is no falsification, provocation by the operating authorities. At the same time, the investigator (inquirer) must be able to verify such a set of data criminal procedure.

b) On the other hand, knowledge free from rigid legal frameworks allows you to more effectively obtain the information you need to prevention, suppression and disclosure of crimes. In our opinion, it should agree with A.S. Zakotyansky, who noted in his dissertation that the possibility of "creative knowledge" outside the rigid framework of procedural restrictions drastically increases cognitive abilities

⁴⁷ Pashayeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. S. 75-76.

operational-search activity⁴⁸ .

Our study of operational-search activity made it possible to identify a number of its significant features. Within the research Our topics of interest are the following two conclusions. Firstly, operational-search activity is an independent type of state activities carried out by a limited number of subjects with using special techniques and methods within the framework of a separate developed legislation. At the same time, both criminal procedure and operational-search activities (along with other tasks) are aimed at obtaining information about a crime. Second, features promptly search activity significantly increase its cognitive opportunities compared to criminal procedural evidence. C the help of operational-search activities are not procedural, but by legal means, openly and secretly, a person is established, committed a crime, a picture of a criminal event is recreated. In many cases only with the use of operational-search opportunities to obtain the necessary information about criminal actions. So, there is an objective need for the organization interaction between subjects of operational-investigative activity and bodies preliminary investigation. Their coordinated activities will ensure effective fight against crime.

However, the results of operational-search activities have no independent evidence. Concerning there is a special problem of the place and significance in the criminal process of the results, obtained in the course of carrying out operational-search activities. It is necessary to establish how the data received by the operational-search way, can be used in criminal procedural evidence with

⁴⁸Zakotyansky A.S. Problems of using non-procedural information in proving in criminal cases: diss. ... cand. legal Sciences / A.S. Zakotyansky. - Samara, 2015. P. 98.

taking into account the strict requirements of the criminal procedure form? Permission of this problem will fully allow the use of cognitive Opportunities for operational-search activities to achieve goals criminal process.

1.3 The provisions of the theory of proof as the basis for use results of operational-search activities in proving the criminal cases

In order to correctly answer the question as the results operational-search activity can be used in proving the criminal cases, it is necessary to distinguish them from criminal procedural evidence.

The methodological basis of the concept of evidence is the analysis criminal procedural evidence from the standpoint of the theory of reflection and informational approach, developed V.Ya. Dorokhov⁴⁹. Informational approach to the concept of evidence at the moment is predominant in criminal procedure science and has its own reflected in the current Code of Criminal Procedure of the Russian Federation. According to this approach, the evidence criminal procedural sense is the unity of content and forms. Both elements of the proof are inextricably linked, which means that information relevant to a case will only become evidence when it is will be obtained in the manner prescribed by the criminal procedure law, and dressed in the form prescribed by the criminal procedure law (witness testimony, expert opinion, etc.).

As for the results of operational-search activities, from the point of view in terms of content, they may coincide with the evidence. At the heart of such

⁴⁹ Theory of evidence in the Soviet criminal process / otv. ed. N.V. Zhogin [i dr.]. - M.: Jurid.lit., 1973.S. 197-228.

conclusion is the philosophical theory of reflection. The property of reflection is the basis of the process of human cognition of objective reality⁵⁰. V.Ya. Dorokhov wrote: "Reflection is based on the universality of interaction processes, things, phenomena. In the process of interaction, objects, phenomena are reflected in each other in various forms, leaving various traces, imprints. Speaking of reflection, we mean the transfer of certain qualities of interacting objects on each other. Interacting objects will always carry some changes. A crime, which is a combination of several elements (phenomena, actions, processes, objects, etc.), always takes place in a certain environment. Therefore, every crime is inevitable comes into contact with the elements of this environment. Entering into interaction with it, the crime is reflected in the environment in the form of material and ideal traces: elements that make up the event. Crimes are reflected in the minds of people, as well as in the form of changes in material objects. Prisoners in material and ideal traces of information, being subsequently revealed by the subject of the operational-search or criminal procedural knowledge become the content according to the results of operational-search activities or evidence. Such information is subjective. Nobody has them can generate or create. They exist as a result of interaction of the crime with the surrounding material world.

At the same time, since the crime acts as a single object as operational-search and criminal procedural knowledge, we can conclude that the results of operational-search activities and the content of the evidence is identical. It should be based on that any actions with the results of operational-search activities,

⁵⁰Ibid. P.206.

⁵¹Ibid. P.206.

conducted within the framework of legal criminal procedure procedures, not bring any new knowledge about the subject.

Therefore, M.P. Polyakov is right that all theoretical attempts dilute the evidence and the results of the ORD on the information line can hardly be recognized as consistent⁵². E.A. also draws attention to this. share. "Ontological prerequisites for using the results of operational investigative activities in proving in criminal cases are that the part of objective reality acting as objects of operational-search and criminal procedure activities, is a holistic, relatively independent phenomenon. Exactly belonging of the objects of the specified types of activity to the same part of objective reality creates an opportunity to use results of operational-search activity in proving in criminal cases"⁵³. Moreover, if we turn to the legal definitions results of operational-search activities and evidence, enshrined in the Code of Criminal Procedure of the Russian Federation, we note that the legislator these two concepts defined through a single category of "information", thereby emphasizing their general information nature. We must agree with L.V. heads that operational and procedural information about a crime as a reflection of reality are unified in their informational nature⁵⁴.

The foregoing allows us to conclude that the results operational-search activities may have such property of evidence as a relation. Relevance of evidence is a property of evidence characterizing the relationship between the content of the evidence and the circumstances, included in the subject of proof or other data relevant

⁵²Polyakov M.P. Using the results of the ORD in proving [Electronic resource] // ConsultantPlus: Ref. legal system. Prof. version Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

⁵³Share E.A. Formation of evidence based on results promptly search activity: monograph / E.A. share. – M.: Prospekt, 2015. P.219.

⁵⁴Golovko L.V. The course of the criminal process [Electronic resource] // Consultant Plus: reference. legal system. Prof. version Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

to resolve the case . This property of evidence in criminal procedure the law follows from Part 1 of Art. 74 of the Criminal Procedure Code of the Russian Federation, which states that Evidence in a criminal case is any information based on which establish the presence or absence of circumstances that have value to the business. As S.A. Schaefer, the most general argument in favor of judgment about the possibility of using non-procedural cognitive activities for the purpose of proving serves to obtain from their using information that has one of the properties of criminal procedural evidence - the property of relevance, because it indicates the facts that form the subject of proof in a criminal case⁵⁶ .

It should also be noted that the methods of cognition in operational-search and criminal procedural activities have a certain similarity. V.K. Znikin draws attention to this circumstance in his dissertation⁵⁷ . The author in his work identified empirical methods knowledge that is used both in criminal procedure and in operational-search activity. In particular, V.K. Znikin identifies such empirical methods of cognition, such as:

- visual study both in general and from different sides of faces and objects of the material world. It corresponds to: inspection of premises, buildings, structures, terrain and vehicles (clause 8, article 6 of the Federal Law

about the OSA); inspection (Chapter 24 of the Code of Criminal Procedure of the Russian Federation);

- addressing specific individuals and collecting responses to the questions they questions in order to find out, find out the information of interest to the questioner, and also study and evaluate individual properties and manifestations of the interlocutor. To him

⁵⁵Yakimovich Yu.K. Criminal procedure law of the Russian Federation / Yu.K. Yakimovich. - St. Petersburg: R. Aslanov Publishing House "Legal Center Press", 2007. P. 251.

⁵⁶Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. - M.: Norma, 2009. Ÿ107-108.

⁵⁷Znikin V.K. The use of operational-search information in criminal procedural evidence: diss. ... cand. legal Sciences / V.K. Znikin. - Tomsk, 1998. P. 57-60.

correspond to: a survey (clause 1, article 6 of the Federal Law on OSA); interrogation (Chapter 26 of the Criminal Procedure Code of the Russian Federation) 58 .

At the same time, the identification and display by operational-search cognitive techniques (despite their similarity with criminal procedural methods of cognition) information that is important for criminal case, does not provide grounds for identifying the results of the search warrant and evidence⁵⁹. The fact is that the methods of obtaining results quickly investigative activities are free from the form imposed by criminal procedural law on the methods of cognition. The information contained in material and ideal traces are not yet proof. "Bye the evidence has not been considered and is not fixed procedurally, - wrote M.S. Strogovich, - it cannot be claimed that the evidence has actually been discovered, for it is not known what has been discovered and whether what is discovered is really evidence. In this case, it is about property of evidence as admissibility. Code of Criminal Procedure binds admissibility evidence in the first place in compliance with the statutory path knowledge (criminal procedural obtaining evidence of a certain species). No information obtained outside the framework of the criminal process, cannot be considered evidence in the criminal procedure sense. To argue otherwise would be essentially to equate the evidence and any other non-procedural information.

The property of the admissibility of evidence is important, in connection with than it received its consolidation in Art. 50 of the Constitution of the Russian Federation, which establishes that in the administration of justice it is not allowed

⁵⁸Znikin V.K. The use of operational-search information in criminal procedural evidence: dis. ... cand. legal Sciences / V.K. Znikin.- Tomsk, 1998.S. C57-58.

⁵⁹Korenevsky Yu.V. Using the results of operational-search activity in proving criminal cases / Yu.V. Korenevsky, M.B. Tokarev. - M.: Yurlitinform, 2000. S. 36-82; Gromov N.A., Gushchin A.N. Problems of interpretation of operational-search data as evidence // Man and the law. - Electron. Dan. -

[B. m.]. - URL: <http://zakon.kuban.ru/spec/spec~5.htm> (date of access: 03/01/2017).

⁶⁰Strogovich M.S. The course of the Soviet criminal process: the main provisions of the science of the Soviet criminal process / M.S. Strogovich. - M.: Publishing house "Nauka", 1968. - Volume 1. - P.302.

use of evidence obtained in violation of federal law.

The requirements of the Code of Criminal Procedure of the Russian Federation to the form of evidence are aimed at ensuring the rights and freedoms of participants in criminal proceedings, as well as to ensure the completeness and the adequacy of the reflection of the evidence in the case file. Property admissibility acts as a guarantee of the objectivity of knowledge. How indicates S.A. Schaefer, the admissibility of evidence is an essential guarantee of establishing the truth⁶¹.

The current Code of Criminal Procedure of the Russian Federation establishes the admissibility of evidence through prohibition of the use of evidence obtained in violation of the requirements

Code of Criminal Procedure of the Russian Federation (Article 75 of the Code of Criminal Procedure of the Russian Federation). V.A. Lazareva notes that the admissible evidence is evidence obtained in compliance with the requirements Code of Criminal Procedure of the Russian Federation. Only such evidence has legal force (i.e. evidence) can form the basis of the accusation and be used to prove circumstances relevant to the case⁶².

Evidence Theorists Determine Admissibility of Evidence

as the compliance of evidence with the requirements of the procedural law regarding the source, conditions and methods of obtaining evidence, as well as their consolidation in a criminal case⁶³. Based on this, science has developed criteria for assessing the admissibility of evidence. admissible evidence will be evidence that: a) is obtained by an authorized subject; b) from a proper source; c) in the manner prescribed by law; d) dressed in the form prescribed by law⁶⁴. Criteria have

its reflection in Chapters 10 and 11 of the Code of Criminal Procedure of the Russian Federation.

⁶¹Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. – M.: Norma, 2009.S. 111.

⁶²Lazareva V.A. Evidence in criminal proceedings: a textbook for undergraduate and graduate students / V.A. Lazarev. - M.: Yurayt Publishing House, 2016. P. 172.

⁶³Theory of evidence in the Soviet criminal process / otv. ed. N.V. Zhogin [i dr.]. - M.: Yurid.lit., 1973. S. 230. ⁶⁴Lazareva V.A. Evidence in criminal proceedings: a textbook for

undergraduate and graduate students / V.A. Lazarev. - M.: Yurayt Publishing House, 2016. P. 172; Arseniev V.D. Questions of the general theory of judicial evidence in the Soviet criminal process / V.D. Arseniev. - M.: Publishing house "Legal Literature", 1964. P. 106. 39

The results of the ORD, of course, can meet the requirement of relevance, then contain information about facts and circumstances relevant to criminal case. However, the results of the ORD are formed outside the framework of the criminal process not from the sources established by the criminal procedure law, outside the conditions and procedure provided for by it, by the subjects of operational-search activity, and not criminal procedural activity⁶⁵. Concerning the results of operational-search activities cannot be considered responsible admissibility requirement.

The concepts of relevance and admissibility are fundamental to deciding the suitability or unsuitability of certain information for use as evidence in a criminal case. However, It should be noted that there is no unanimity of opinion in science in defining the properties that a proof should have. If a relevance and admissibility by all authors is recognized as mandatory properties of evidence, then with respect to such a property evidence as certainty there is no consensus. Under certainty understand the correspondence of the information constituting the content of the evidence to reality⁶⁶.

Of course, the conclusions of the investigating authorities must be based on reliable evidence. Therefore, some authors believe that evidence is information that has not only the property of relevance and admissibility, but also reliability.⁶⁷ This point of view is not is consistent with the law. In this case (if you include the confidence property concept of evidence) the moment of appearance of evidence in a criminal case

⁶⁵Kaats M.E. The use of operational-search information in criminal litigation: diss. ... cand. legal Sciences / M.E. Kaatz. - Ufa, 2008. S. 135-136.

⁶⁶Bulatov B.B. Criminal procedure: a textbook for universities / B.B. Bulatov, A.M. Baranov. - M.: Yurayt Publishing House, 2014. S. 154.

⁶⁷ See, for example: Kostenko R.V. Evaluation of criminal procedural evidence: Monograph / R.V. Kostenko. - M.: Publishing house "Yurlitinform", 2010 P. 85-95; Budnikov V.L. The content of criminal evidence // Legal aspect. - 2007. - No. 1. - P. 24-27; Artamonova E.A. Fundamentals of the theory of evidence in the criminal process of Russia: textbook. allowance / E.A. Artamonova, O.V. Firsov. - M.: Norma: INFRA-M, 2014. P.43-44.

far removed, since the reliability of the evidence cannot be identified at the time of receipt. Reliability of evidence is established as a result of their verification and evaluation, taking into account the totality collected evidence.

Yu.K. Yakimovich, considering the concept of evidence, enshrined in part 1 of Art. 74 of the Code of Criminal Procedure of the Russian Federation noted that the legislator put an end to the dispute about the concept evidence. From this article, according to the author, it follows that with recognition of certain information as evidence, one should not assess their reliability⁶⁸. Evidence collected in a case may include true and false information. So, for example, in a situation where The defendant in the case gives evidence in which he denies his guilt and At the same time, the witness testifies incriminating the accused in committing crime, it is obvious that someone's testimony will be unreliable. However and the testimony of the accused and the testimony of the witness, fixed in the protocols interrogation, will act as evidence in the case. Reliability and and others still have to be established by the investigator and the court. In our opinion, it should agree with S.A. Shafer, who spoke on this issue as follows: "The logic of the cognitive process is such that any evidence obtained by a competent authority is always at first problematic, since the information contained in it can be both true as well as false. That is why every piece of evidence subject to subsequent verification and evaluation, in the process of which its reliability is determined"⁶⁹. The requirement of reliability in the concept of evidence is not enters, - writes V.P. Bozhev, - reliability is determined as a result of its verification⁷⁰. Criminal procedure law allows for conflicting evidence in a criminal case (for example, in accordance with

⁶⁸Yakimovich Yu.K. Evidence and proof in the criminal process of Russia: study guide / Yu.K. Yakimovich. - Tomsk: Publishing House Vol. un-ta, 2015. S. 21.

⁶⁹Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. - M.: Norma, 2009. P.67.

⁷⁰Bozhev V.P. Criminal process: textbook / V.P. Bozhev. - M.: Yurayt Publishing House, 2016. P.128.

part 1 of Art. 220 of the Code of Criminal Procedure of the Russian Federation in the indictment, the investigator indicates a list of evidence supporting the charge and a summary of its content, as well as a list of evidence referred to by the party protection, and a summary of their content) and proceeds from the fact that the information obtained can serve as a criminal case evidence in the presence of the property of relevance and admissibility.

Having considered ratio results operational search activities and evidence, we have established the similarity of their epistemological, information nature and the difference in the legal regimes for their receipt. From all of the above, it should be concluded that the admissibility is the criterion by which evidence is distinguished and the results of operational-search activities. However, it should be noted that in recent years in the procedural literature more and more often began to meet attempts to revise the traditional provisions of the theory of proof and everything the criminal process as a whole. The Russian criminal process is increasingly is being criticized. Many scholars and practitioners point to inefficiency of the current criminal procedure regulation.

The idea of a radical reform of the Russian criminal process, giving it features of the Anglo-Saxon type, free from strict legal regulation of evidence. Advisor to the Constitutional Court of the Russian Federation A.V. Smirnov believes that it is becoming increasingly clear that the Russian criminal process needs not only the current improvement through local changes and additions, and in fundamental revision. Questions are actively discussed in the literature deformation of the pre-trial stage of the criminal process, expansion operation of the adversarial principle, introduction to criminal proceedings parallel investigation conducted by a lawyer, the creation of an institution

71Smirnov A.V. Russian criminal process: a new model is needed [Electronic resource] // Open Police. - Electron. Dan. - [B. m.]. - URL: <https://openpolice.ru> (date of access: 03/01/2017).

forensic investigators . The changes proposed by the authors of the criminal legal proceedings undoubtedly have a number of positive aspects. Together with the borrowing into the Russian criminal proceedings of any institutions without taking into account national specifics, features of the domestic lawmaking and law enforcement will not ensure effective work criminal process.

The introduction of these transformations inevitably leads to a change in the type criminal process, its deformatization. Such reforms are obviously will also have an impact on the resolution of the issue of using the results operational-search activity in proving. Compliance requirement the procedure for collecting evidence established by the criminal procedure law, as we have established earlier, is the only criterion delimitation of evidence and results of the operational-search activities. Deformatization of the criminal process will eliminate this criterion, and therefore eliminate the differences between evidence and the results of operational-search activities.

Fundamental reforms entailing a change in the type of process to our view, are not needed by the domestic criminal process for various circumstances. The main reason is related to the fact that such reforms cannot guarantee an improvement in the quality of criminal legal proceedings. It must be assumed that there is no single correct systems. Each type of criminal procedure has its own advantages. and negative sides. Just changing the law won't solve everything

72 See, for example: Smirnov A.V. Russian criminal process: a new model is needed [Electronic resource] // Open Police. - Electron. Dan. - [B. m.]. - URL: <https://openpolice.ru> (date of access: 03/01/2017); Aleksandrov A.S. Doctrinal model of criminal procedural evidentiary law of the Russian Federation [Electronic resource] // International Association for the Promotion of Justice. Electron. Dan. [B. m.]. - URL: <http://www.iauaj.net/node/1766> (date of access: 03/01/2017); Ponkina E.V. Information-cognitive aspects of the criminal procedural function of protection: abstract of diss. ... cand. legal Sciences / E.V. Ponkin. P.9-22.; Golovko L.V. Investigating judges or another round of "Americanization" of the Russian criminal process? / Zakon.ru. - Electron. Dan. - [B. m.]. - URL: <https://zakon.ru/blog/2015/3/16/> (date of access: 03.03.2017).

problems. In our opinion, we should agree with S.A. Schaefer, who noted that the borrowing of procedural forms is possible up to certain limits, as long as such borrowing is not tantamount to changing the type of process, unless, of course, such a reform is recognized by society and necessary by the state .

Radical reformation of the Russian criminal process will require a change in the system of law enforcement agencies, which in turn will lead to large financial costs. For such a step the legislator must receive a real justification for the effectiveness of deformatization and change of the type of criminal process.

In our opinion, such reforms, if they are carried out in our country, then not in the coming years. So the question is how the data obtained by operational-search means, can be used in criminal procedural evidence, taking into account the strict requirements of criminal procedural form remains relevant.

Conclusions to the first chapter:

1. First attempts at regulation of use

the results of the operational-search activity in the interests of criminal proceedings were carried out at the beginning of the 20th century.

2. Development of legal regulation of the use of promptly search information in the criminal process at the present stage

indicates the transition of regulation from the sub-legislative level to the level

law. At the same time, normative regulation of the use of results

ORD in the criminal process develops mainly within the operational search legislation.

3. At the moment, the Code of Criminal Procedure of the Russian Federation does not contain specific instructions regarding the procedure for using the results of the OSA in

73Sheifer A. S. Evidence and Proof in Criminal Cases: Problems of Theory and legal regulation / S.A. Shafer. – M.: Norma, 2009. S. 230.

proof. The absence of a clear position from the legislator inevitably creates
row difficulties in practical activities. Necessary
improve criminal procedure legislation for
ensuring the rational use of forces and means promptly
search activity. To this end, it is necessary to provide in the Criminal Procedure Code of the Russian Federation
norms that would regulate the procedure for using the results of the OSA in
proof, that is:

- consolidated the right of operational-search bodies to provide
the results of the operational-search activity (at the moment, the existence of such a right has to be judged
based on the norms of the Federal Law on OSA, however, this regulatory act does not regulate
social relations in criminal
legal proceedings);

- established the obligation of the preliminary investigation bodies
consider the submitted operational materials and take on them
appropriate procedural decision;

- clearly determined the ratio of the results of the ORD and evidence;
-determined the mechanism of use in evidentiary activity
information obtained by investigative means.

four. Circumstance Finding Activities

committed crime, is carried out not only within the framework of criminal
process. Cognition of the crime event at the expense of other special types
knowledge goes beyond the scope of criminal procedure.
Operational-search activity with its inherent forces and methods
is an effective means of identifying, detecting signs
crimes.

5. Signs of operational-search activity are:

- exclusively state-legal nature promptly
search activity;
-carried out through the conduct of operational-search
events;

-carried out in vowel and tacit forms;

-carried out for achievements goals, by law

formulated in the Federal Law on OSA.

6. The importance of operational-search information for criminal process is connected with the peculiarities of operational-search activity, increasing its cognitive capabilities in comparison with criminal procedural evidence. These features should include:

a) the possibility of direct perception by employees

operational units of the crime event;

b) the possibility of carrying out operational-search knowledge in conspiracy conditions;

c) the lack of detailed legal regulation of cognitive techniques and methods of operational-search activity.

The above features of operational-search knowledge make it effective means of combating crime, preventing and suppression of criminal activity, search for the perpetrators. However

results operational search activities independent

have no evidentiary value. As a result, there is a special

the problem of the place and significance in the criminal process of the results obtained in during the implementation of operational-search activities.

7. The methodological basis of the concept of evidence is analysis criminal procedural evidence from the standpoint of the theory of reflection and information approach. Crime as a phenomenon of objective reality, interacting with the environment,

reflected in it in the form of material and ideal traces. prisoners in

ideal and material traces, information becomes content

evidence after it has been obtained in the manner prescribed

criminal procedure law (i.e. through the production of investigative and

other procedural actions provided for by the Code of Criminal Procedure of the Russian Federation) and are clothed in form prescribed by law (witness testimony, expert opinion and

etc.). This unity of content and form is evidence in criminal procedural sense.

8. The results of the ORD can certainly meet the requirement relevance, that is, contain information about the facts and circumstances that have significance for the criminal case. However, the results of the ORD are formed for within the framework of the criminal process, not from the sources established by the criminal procedural law, outside the conditions and procedure provided for by it, subjects of operational-search activity, and not criminal procedural activities. As a result, they cannot be considered responsible. admissibility requirement.

9. Having considered the ratio of the results of the operational-search activities and evidence, we have established the similarity of their epistemological, information nature and the difference in the legal regimes for their receipt. Admissibility is the criterion by which a distinction is made evidence and results of operational-search activities.

2 The mechanism for using the results of the operational-search activities in criminal procedure evidence

2.1 The procedure for using the results of the operational-search activities in proving in criminal cases

When we talk about the procedure for using the results of the ORD in evidence in criminal cases, the main issue is to ensure that determine whether the information obtained by operational means be used directly to establish the circumstances specified in

article 73 of the Code of Criminal Procedure of the Russian Federation.

E.Kh. Pashayeva, in her dissertation research, rightly noted, that operational information can be used directly in criminal process only when making procedural decisions, the factual grounds of which the law associates not with the availability of sufficient evidence, but with the availability of “sufficient data”⁷⁴. In other words, in such cases, the procedure for obtaining data is not important, but their content. At the same time, when we are talking about proof in criminal case, the law binds the establishment of the circumstances referred to in Art. 73 Code of Criminal Procedure RF, exclusively with evidence. We have previously pointed out that evidence and the results of the ORD are not identical concepts, and also established that that the criterion for their differentiation is the admissibility property. Code of Criminal Procedure regulating proof in criminal cases, admissibility property evidence links with the observance of such an element of the process of proof, as a collection of evidence (i.e., proper procedural way of obtaining them). From what has been said, it follows that rigid the requirements established for the form of collecting evidence, give

⁷⁴ Pashayeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. P. 69-70.

the ability to use the results of the ORD only in an indirect form. As E.Kh Pashayeva writes, the mediated form implies a procedure transformation (transformation) of the results of the ORD into procedural evidence in the case through the use of criminal procedure mechanisms⁷⁵. In this regard, it seems correct, in our opinion, to the procedure for using operational data in proof, in which the results of the ORD are considered only as information about the sources information that can later become evidence, by obtaining and fixing it in the established criminal procedure law in order⁷⁶. This means that in order to use the information which are the content of the presented results of the OSA, it is necessary establish the source of this information and extract it from this source in order, established by the Code of Criminal Procedure of the Russian Federation. Only in this case, the evidence formed using the results of the ORD will meet admissibility requirement. Use of operational information - writes R.S. Belkin - is to find and determine ways to give it source of procedural status, and then in the extraction from these sources of the same information, but already acting as evidentiary⁷⁷.

Supporters of this approach can be called such scientists as A.V. IN AND. Zazhitsky⁷⁸, A.R. Belkina⁷⁹, R.S. Belkina⁸⁰, Pobedkina⁸¹, N.V.

⁷⁵ Pashayeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. From 72.

⁷⁶ Pobedkin A.V. Criminal Procedural Evidence: Monograph / A.V. Pobedkin. - M.: Publishing house "Yurlitinform", 2009. S. 244.

⁷⁷ Averyanov T.V. Forensic support for the activities of the criminal police and preliminary investigation bodies: Textbook. / T.V. Averyanova, R.S. Belkin. - M.: New Lawyer, 1997. S. 154-156.

⁷⁸ Zazhitsky V.I. The results of operational-search activity in criminal proceedings. Theory and practice / V.I. Zazhitsky. - St. Petersburg: Legal Center Press, 2006. S. 184-196.

⁷⁹ Belkin A.R. Theory of proof in criminal proceedings / A.R. Belkin. - M.: Norma, 2005. S. 145-146.

Izotov⁸², I.B. Mikhailovskaya⁸³, O.A. Vagina⁸⁴ and others. Analyzed the mechanism for using the results of the ORD in proving is consistent from the point of view of the established provisions of the theory evidence. It corresponds to the basic postulates of the information approach to understanding evidence. The mechanism is based ideas about criminal procedural evidence as a unity content and form.

On such a mechanism for using the results of the ORD in proving guides the law enforcer and the Constitutional Court of the Russian Federation. How many times in its decisions, the Constitutional Court of the Russian Federation indicated, in accordance with the current criminal procedure legislation results promptly search activities are not evidence, but only information about sources of those facts which, being obtained in compliance with requirements of the Federal Law "On operational-search activity", can become evidence only after fixing them properly in a procedural way, namely on the basis of the relevant norms of the Code of Criminal Procedure of the Russian Federation⁸⁵.

⁸⁰Belkin R.S. Collection, research and evaluation of evidence: essence and methods / R.S. Belkin. - M.: Publishing house "Nauka", 1966. S.42-43. ⁸¹Pobedkin A.V. Criminal Procedural Evidence: Monograph / A.V.

Pobedkin. - M.: Publishing house "Yurlitinform", 2009. S. 283.

⁸²Izotova N.V. The use of operational-search information in providing evidence in criminal proceedings: diss. ... cand. legal Sciences / N.V. Izotov. - Voronezh, 2003. S.18,21.

⁸³Criminal procedural law of the Russian Federation / L.N. Bashkatov [and others]; resp. ed. I.L. Petrukhin, I.B. Mikhailovskaya. - 3rd ed., revised and additional. - M.: Prospekt, 2010. S. 227-230.

⁸⁴Vagin O.A. Operative-search measures and the use of their results: a practical training manual / O.A. Vagin, A.P. Isichenko, G.Kh. Shabanov. - M.: Shumilova I.I. Publishing House, 2006. P.69.

⁸⁵On the refusal to accept for consideration the complaint of citizen Maria Yuryevna Myazina about the violation of her constitutional rights by the provisions of Articles 6 and 15 of the Federal Law "On Investigative Activities" and Articles 170, 176, 177 and 183 of the Code of Criminal Procedure of the Russian Federation [Electronic resource]: definition of the Constitutional Court of the Russian Federation of November 20, 2014 N 2557-O // ConsultantPlus: Ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

A slightly different position on the use of the results operational-search activity in proving was expressed by E.A. share. Mine the author reflected the approach in the monograph "Formation of evidence based on results of operational-investigative activities. E.A. Share in their reasoning proceeds from the same premise as the authors earlier analyzed approach, according to which the results of the ORD do not meet admissibility requirement due to the fact that operational-search information are obtained not from sources and in ways not provided for by the criminal procedure law⁸⁶. At the same time, E.A. Share notes results ORD also do not have the property of relevance. "The indicated results are formed outside the framework of criminal procedural activity. That's why, Strictly speaking, they do not meet the requirement of relevance to content formed precisely within the framework of the criminal process, and not for its outside, and precisely by its subjects, and not by the subjects of operational-search activity, evidence"⁸⁷ .

The fact is that E.A. The share from other positions is suitable for understanding the content of the evidence. According to the author, information about the facts (the content evidence) is the result of sensory knowledge of the investigator (interrogating officer) traces of the crime. As a result of acts of sensory cognition, information about the relevant facts. "They (results of ORD and evidence) formed at different times, in different places, in different conditions and in different order. They are formed, and this should be emphasized in particular, and are not collected or extracted from a specific carrier . Consequently, speaking about the formation of evidence, we are talking about their content, and not just procedural form. Information about the same, relevant to criminal case circumstances emanating from the same person, obtained in the framework of the operational-search activity, and later during the interrogation - these are different in

⁸⁶ Share E.A. Formation of evidence based on results promptly search activity: monograph / E.A. share. – M.: Prospekt, 2015. S. 238.

⁸⁷Ibid. S. 238.

⁸⁸Ibid. S. 239.

the nature of information.

Thus, based on the reasoning of E.A. Share, content evidence does not form the information that was obtained as a result of perception by the participants of these operational-search activities facts and circumstances relevant to the criminal case, and the actual data generated by the subjects of investigative actions in the course of direct perception by them of the indicated circumstances and facts. Eventually E.A. Share comes to the conclusion that the results of the ORD can be used in proof only as a basis for the formation of evidence within the framework of the criminal procedure form⁸⁹.

On the need to comply with the procedural form when The use of the results of operational-search activities in proving is also indicated in a different approach, however, already from a different position⁹⁰. The authors concepts are based on the fact that the results of the ORD acquire the status evidence as a result of their introduction into the criminal process requirements of the criminal procedure form. At the same time, representatives concepts do not deny that the results of the OSA in themselves can act as as evidence. P.A. Lupinskaya wrote that "in fact, we are talking about submission of documents, items obtained as a result of promptly search activities, to attach them to the case as evidence"⁹¹. To the requirements of the procedural form, the observance of which allows the use of the results of the ORD as evidence, the authors concepts under analysis include:

⁸⁹ Share E.A. Formation of evidence based on results promptly search activity: monograph / E.A. share. – M.: Prospekt, 2015. S.293-330.

⁹⁰Lupinskaya P.A. Criminal Procedure Law of the Russian Federation: Textbook / P.A. Lupinskaya. - M.: Jurist, 2005. S.306-310; Klenov D.I. Procedural procedure for using the results of operational-search activities in proving at the pre-trial stages of criminal proceedings: diss. ... cand. legal Sciences / D.I. Klenov. - Izhevsk, 2005. From 17; Makarova T.A. The use of audio and video recording materials during the preliminary investigation: abstract of diss. ... cand. legal Sciences / T.A. Makarov. - Izhevsk, 2004 S.7, 12-13.

⁹¹Lupinskaya P.A. Criminal Procedure Law of the Russian Federation: Textbook / P.A. Lupinskaya. - M.: Jurist, 2005. S. 310.

a) Compliance with the procedure for presentation and attachment to the criminal case results of the operational-search activity in the criminal process. In accordance with Part.1 Article. 86 Code of Criminal Procedure collection of evidence is carried out through the production of investigative and other procedural actions. Such a process is submission of evidence to the investigating authorities⁹². At the same time, S.A. Shafer writes that, in fact, the view is the only receiving channel in criminal process evidence from the outside. Therefore, any member process, as well as the body carrying out the operational-search activity, to introduce its results into the criminal process, this channel can be used⁹³.

The presented results of the operational investigation should be attached to the criminal case in the manner prescribed by the Criminal Procedure Code of the Russian Federation for each type of evidence. What evidence can the results of the ORD provide? According to representatives of the analyzed concept, the results of the ORD can be introduced into the criminal case in the form of material evidence and other documents⁹⁴. The introduction of the results of the operational investigation into a criminal case is carried out in the following way:

- Operational and official documents (decree on holding ORM, acts, protocols and other documents drawn up in the course of production ORM), which fix the course and result of the operational-search activities are attached to the criminal case as "other evidence." For the use of "other documents" in criminal proceedings as evidence they must be obtained in the prescribed law in order - in this case, they are represented by the operational-search authorities investigator (inquirer) carrying out criminal proceedings

case. The Criminal Procedure Code of the Russian Federation does not establish a requirement to issue a special

⁹²Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. – M.: Norma, 2009. P.119.

⁹³Ibid. S. 118.

⁹⁴Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. - M.: Norma, 2009. P. 114; Muzhenskaya N.E. Guide for investigators and interrogators on the investigation of certain types of crimes: in 2 parts / N.E. Muzhenskaya, G.V. Kostylev. - M.: Prospect, 2013. - Part 1. - S. 398.

resolutions for the attachment of "other documents" to the materials of the criminal affairs. A.G. Kalugin and I.E. Ermolaev indicate that compliance with the order submission of documents for attachment to the criminal case, as well as compliance of the documents themselves with the established regulatory requirements, ensure that this type of evidence meets the admissibility requirement⁹⁵ .

- Material carriers of information that were obtained during production of operational-search measures in the implementation necessary procedural actions are attached to the criminal case as material evidence⁹⁶ .

In accordance with Art. 81 Code of Criminal Procedure

these items must be inspected and attached to criminal case through the issuance of an appropriate decision.

b) Disclosure of information on the results of the operational activity, allowing to carry out checking them. From the normative definition of evidence and the provisions of paragraph 2 of part 2 Art. 75 of the Code of Criminal Procedure of the Russian Federation, - writes S.A. Shafer, - the general rule follows: the actual data of unknown origin can under no circumstances become evidence ⁹⁷ . In relation to the results of the OSA, this provision reflected in clause 20 of the Instruction. P.A. Lupinskaya, speaking of the use in proving the results of the ORD, notes that the information obtained in the course of operational-search activities, can be used as evidence, if they are communicated (transferred) to the person conducting the investigation, with indication of data on the person, method and time of receipt of certain information during the ORM, which make it possible to verify this information by conducting appropriate investigative and other procedural

⁹⁵Kalugin A.G. The use of data obtained in the course of operational-search activities in the process of proving in a criminal case: a study guide / A.G. Kalugin, I.E. Ermolaev. - Krasnoyarsk: Siberian Law Institute of the Ministry of Internal Affairs of Russia, 2009. P.20.

⁹⁶Sheifer A.S. Evidence and proof in criminal cases: problems of theory and legal regulation / S.A. Shafer. - M.: Norma, 2009. S.113-114

⁹⁷Sheifer A. S. Evidence and Proof in Criminal Cases: Problems of Theory and legal regulation / S.A. Shafer. - M.: Norma, 2009. S. 112.

action⁹⁸ .

There are also approaches whose authors advocate that the results of the ORD are information suitable for procedural use as evidence without any transformation, identifying the results of the ORD and the evidence. In particular, V.T. Tomin and I.A. Zinchenko argue that “results of the search warrant are evidence if they are received and checked in the manner prescribed by the Federal Law “On operational-search activity”, and contain information relevant for establishing the circumstances specified in Article 73 of the Code of Criminal Procedure of the Russian Federation”⁹⁹.

In the most complete form, the indicated mechanism for using the results The ORD was presented by M.P. Polyakov: “As part of the operational-search activity there are fairly strict rules for evaluating information based on criteria of relevance and admissibility, which largely allows talk about the reliability of information produced by operational search technology. Based on this, the results of the ORD are a ready-made information product that needs not transformation, but interpretation ¹⁰⁰. According to M.P. Polyakova, the results of the ORD should be entered into the system of evidence and evaluated on a par with other factual data¹⁰¹ .

Note that this approach does not correspond to the theoretical provisions regarding evidence in criminal proceedings, nor current criminal procedure regulation. In particular, the thesis M.P. Polyakov that within the framework of operational-search activities

⁹⁸Lupinskaya P.A. Criminal Procedure Law of the Russian Federation: Textbook / P.A. Lupinskaya. - M.: Jurist, 2005. S. 307.

⁹⁹Tomin V.T. Criminal process. Problem lectures / V. T. Tomin, I. A. Zinchenko. - M.: Yurayt Publishing House, 2015. P.

454. ¹⁰⁰Polyakov M.P. Criminal procedure interpretation of the results of operational search activity: monograph / M.P. Polyakov. - Nizhny Novgorod: Nizhny Novgorod Law Academy, 2001. S. 220.

¹⁰¹Polyakov M.P. Criminal procedural use of the results of operational search activities: problems of theory and practice / M.P. Polyakov, A.P. Popov, N.M. Popov. - Pyatigorsk: PSLU Publishing House, 1998. S. 50.

there are fairly strict rules for evaluating information based on criteria of relevance and admissibility does not correspond to reality. Authors of this view should keep in mind that operational-search materials cannot acquire the property of admissibility due to the fact that, upon receipt of them, the body exercising operational search activity complied with the rules for conducting one or another operational-search activity, since these rules are established by the Federal Law about OSA and departmental instructions i.e. are non-procedural. The requirements of relevance and admissibility are presented in criminal proceedings, and not within the framework of operational-search activities and to evidence, and not to result of the ORD. In our opinion, we should agree with the statement made by A.A. Shamardin, who points out that in order to achieve the goals of proof it is necessary to improve the quality of evidentiary activities, and not open the way for convicting a person on the basis of undercover data obtained outside of any procedural guarantees of individual rights .

If the above theoretical concepts are aimed at creation of a general procedure for using the results of the ORD in proving for any type of operational-search information, then in practical activities take a different approach. The study of criminal cases, considered by the district courts of the city of Tomsk allows us to conclude that that practitioners, when using operational information in proofs do not follow any single concept. In practice, the order use of the results of the OSA in proving, as well as specific procedural actions and decisions that investigators carry out to generating evidence using operational information, depend on the nature of the data obtained and are determined in each specific case.

102Shamardin A.A. On the issue of using the results of operational-search activities in proving // Proceedings of the Orenburg Institute (branch) of the Moscow State Law Academy. (Issue 9) - Orenburg. - 2008. - S. 342 - 356.

Studying the practice of investigating crimes related to illegal sale of drugs, as well as giving and receiving bribes showed that the information obtained during the production of ORM and submitted to the preliminary investigation authorities may be enshrined in the following materials of operational-search activities: in operational documents that record the progress and results ORM production; on technical means of fixing information (materials of photo, video filming, audio recording); in other material carriers information; in the explanations of the persons participating in the ORM.

So, for example, in criminal case No. 1-204/13103 on N.'s charge of committing a crime, under Part.3 Article. 30, p. "b" part 3 of Art. 228.1 CC The Russian Federation conducted an operational-search activity test purchase Information obtained by operational staff during production test purchase was recorded in the following materials operational-search activity: report, protocol of personal search "purchaser", the protocol of inspection of funds, the protocol of issuance of cash funds, a protocol for the voluntary issuance of narcotic drugs and things attitude to the study, the conclusion of a specialist, explanations of attesting witnesses, explanation of the "buyer", the act of observation, a package with a narcotic substance.

The procedure for presenting the results of the ORD, provided for in paragraph 8 interdepartmental Instructions before sending the materials of the ORD to the relevant authority under Art. 12 of the Federal Law on OSA requires consideration of the issue of the need to declassify information constituting the state the secret contained in the submitted results of the operational-search activity, and their carriers.

Obviously, there may be situations where declassification information constituting a state secret, seems impractical, which in turn creates an obstacle to the use results of the operational-search activity in the criminal process. There is a conflict between interests operational search activities and criminal procedure

activities when it is necessary to make a choice between providing evidence identified through the ORM and the need to declassification of information contained in materials reflecting ORD results.

If the question of declassifying information constituting state secret, is decided positively, then an advising resolution. In this case, the results of operational-search activities on the basis of the decision of the head of the body carrying out the operational-search activity, submitted to the preliminary investigation body. At the same time, it is obvious that the operational staff, based on the established signs crimes, should determine jurisdiction and send materials

ORD to the authorized body. In particular, all the operational materials that contained information about the signs of a crime,

provided for by Article. Article. 290 and 291 of the Code of Criminal Procedure of the Russian Federation, with a cover letter sent to the heads of investigative departments for the city of Tomsk of the Investigative Committee of the RF IC for Tomsk region, because by virtue of Art. 151 of the Criminal Code of the Russian Federation preliminary investigation of criminal cases on crimes under Art. Article.

290 and 291 of the Criminal Code of the Russian Federation are carried out by investigators of the Investigative Committee Russian Federation.

Having received the ORD materials, the investigator (interrogating officer) must carry out a number of procedural actions that will allow to form the necessary evidence. Conducted analysis of practical activities bodies of preliminary investigation allows you to determine the procedure, which investigators (interrogating officers) are guided by when using ORD results in proving:

1. All persons involved in the preparation and bringing promptly search activity, are interrogated in order to obtain and fix in criminal procedural order of information about the ideal (personal) character. In particular, for each of the criminal cases studied by us, for who conducted a test purchase and an operational experiment in

operative officers, witnesses, purchasers, agents and other persons who took part in operational search activities. At the same time, this method of obtaining and fixing information of an ideal nature, obtained as a result of the OSA, is the only true one, because, due to the requirements of the Code of Criminal Procedure of the Russian Federation to the method collecting evidence explanations given by buyers, agents, other persons outside the procedural form cannot be considered as evidence.

2. If the presented results of the ORD contain material information media (audio or video cassettes issued by the purchaser narcotic substance and other items seized during the operational-search activities), then in order to contain information was recognized as evidence, investigators (interrogators) inspection of material carriers of information is carried out, as well as decision on the recognition and attachment of physical evidence (i.e. officials work with them according to the rules that are established for physical evidence).

3. All operational documents are used in the case in as such evidence as "other documents". In particular, in the criminal case No. 1-383/15104 in the indictment, and then in in the verdict, as evidence confirming guilt, all provided operational and service documents, namely: resolution about conducting an operational experiment, a decision on declassification information constituting a state secret, report, act of extradition technical means, a protocol for the inspection of funds, a protocol for issuing funds, an act of withdrawal of technical means, an act of observation. In criminal case No. 1-432/13105, the court did not sentencing does not refer to evidence, but to

104Case No. 1-383/15 // Archive of the Oktyabrsky District Court of Tomsk. – 2015.

105Case No. 1-432/13 // Archive of the Leninsky District Court of Tomsk. – 2014.

ORD materials: "... in addition to this wine, M. is confirmed by those studied in at the court session with the materials of the ORD on the test purchase: protocol of personal inspection of the purchaser, protocol of inspection of funds, cash disbursement protocol, voluntary disbursement protocol narcotic drug, ... ". The question arises: is it permissible to use operational and service documents fixing the course and result of ORM directly as evidence as "other documents"? On our view documents compiled by operational staff in the course of production of ORM, cannot be used directly in a criminal case as "other documents", since, as we noted earlier, promptly investigative activity is carried out in a free form, is not subject to procedural requirements for obtaining and fixing evidence. That's why operational documents cannot be confirmed, for example, the fact of buying drugs or receiving a bribe. To confirm data circumstances, it is necessary to use the evidence generated through independent receipt and fixation by the investigator necessary information (as a result of interrogations of participants ORM, inspection of audio or video recordings, etc.). In this regard, we believe that one should agree with E.Kh. Pashayeva, who notes that promptly official documents may be used only to the extent that they contains information that makes it possible to judge the legality and circumstances holding the event (time, place, participants) - in order to verify the initial evidence¹⁰⁶ .

Thus, the study of practical activity allows conclude that there is currently a situation where the results of the OSA are used in proving the circumstances provided for

¹⁰⁶Pashayeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. From 76.

Art. 73 of the Criminal Code of the Russian Federation both indirectly and directly without carrying out any legal proceedings.

In our opinion, implementation in criminal procedural proof operational information is possible only within the framework of the current legal regulation of evidentiary activities and taking into account the main provisions of the theory of proof. At the same time, it should be taken into account that the investigative and criminal procedural activities are two independent types of state activity, each of which has its own distinctive features and characteristics. Using results promptly investigative activities in the course of criminal proceedings should not lead to their merging, to the substitution of criminal procedural means and methods of solving crimes by operational-search methods and methods, since this inevitably leads to a decrease in the level of protection guarantees human rights and freedoms.

In operational-search activities, legal relations between state bodies and citizens have not received the degree of development that is inherent in criminal proceedings¹⁰⁷. Persons for whom operational-search activities are carried out are not provided the necessary set of guarantees for the protection of rights and legitimate interests. The operational-search activity is primarily aimed at combating crime. This activity is active, offensive, has a pronounced reconnaissance and search character¹⁰⁸. For this, in particular, indicate fixed in Art. 2 FZ about OSA tasks.

Efficiency of operational-search knowledge of the event of crimes related to the fact that this activity is free from detailed legal

¹⁰⁷Firsov O.V. Legal foundations of operational-search activities: educational allowance / O.V. Firsov. - M.: INFRA-M, 2011. S. 54.

¹⁰⁸Kondratiev M.V., Drapezo R.G. On the relevance of operational-search activity at the present stage of development of the state // Bulletin of the Kemerovo State University. - 2015. - No. 2. - P.171-172; Lapin E.S. Operative search activity. Course of legal and theoretical foundations / E.S. Lapin. - M.: Publishing house "Yurlitinform", 2010. P. 6.

regulation, carried out mainly in an unspoken form, in conditions of limited control, uses only its inherent special ways and methods of cognition (Article 6 of the Federal Law on ORD). Overwhelming majority Articles of the Federal Law on OSA contain statements-statements: on the concept, tasks, principles and legal basis of operational-search activity, denominations operational-search events, bodies, those carrying out the operational-search activity, etc.¹⁰⁹ . Most of the regulations regulating the production of operational-search activities are confidential nature, information about used or used in carrying out covert operational-search activities forces, means, sources, methods by virtue of Art. 12 Federal Law on OSA are state secret. ORM production is subordinated only departmental control, with the exception of ORM, which restrict constitutional rights of citizens (Article 8 of the Federal Law on OSA). Minimal amount controlling, deterrent, limiting the activities of operatives by a mechanism, mechanisms protection of human rights and freedoms creates favorable conditions for identifying necessary information and disclosure of the crime. On the other hand in under such conditions, the threat of violation of the rights and freedoms of of a person, as well as falsification of the results of the investigative activity, formation inaccurate operational information.

Criminal procedural activity, in turn, as priority is determined not by the disclosure and investigation of a crime, but by the protection human rights and freedoms (Article 6 of the Code of Criminal Procedure of the Russian Federation). Guilty verdict, whatever come what may, the condemnation of a person, if he is charged, is not an end in itself for the prosecutor, notes V.I. Torgovchenkov (Prosecutor of the Tambov

¹⁰⁹Bezlepkin B.T. Handbook of the investigator and interrogator / B.T. Bezlepkin. - 3rd ed., revised. and additional – M.: Prospekt, 2014. P.256.

region, State Counselor of Justice 3rd class)¹¹⁰ .

Note that the prioritization between solving the crime and protection of human rights and freedoms in domestic criminal proceedings in different periods of time was not the same. During the Soviet period, our history, the criminal process was characterized by its focus on combating crime. So, during the period of the Code of Criminal Procedure of the RSFSR of 1960, the tasks criminal procedure activities were prompt and full disclosure crimes, exposing the perpetrators and ensuring the correct application law so that everyone who commits a crime is subjected to fair punishment and not one innocent was brought to justice criminal liability (Part 1, Article 2 of the Code of Criminal Procedure of the RSFSR). Such a formulation tasks of criminal procedural activity suggests that the purpose criminal process is the fight against crime.

In the 1990s, along with the formation of a democratic state and market economy has undergone significant changes in society. The changes affected, among other things, the criminal procedure sphere. After adoption of the Constitution of the Russian Federation in 1993, and then the Criminal Procedure Code of the Russian Federation of 2001 reveals a desire state to ensure the protection of the individual in criminal proceedings. The state prioritized the individual, his rights and freedoms.

The Russian Federation is a legal state (Article 1 Constitution of the Russian Federation). Every legal state is built on the principles separation of powers, the rule of law, guarantees and inviolability rights and freedoms of citizens, mutual responsibility of the citizen and the state, restrictions on state intervention in private life, the reality of rights

¹¹⁰Torgovchenkov V.I. A guilty verdict is not an end in itself for the prosecutor [Electronic resource] // Criminal process - 2017. - No. 4. - Electron. print version. publ. - URL: <http://e.ugpr.ru/article.aspx?aid=542453> (date of access: 03/20/2017).

personality, ensuring its free development¹¹¹. Man, his rights and freedoms according to the Constitution of the Russian Federation are the highest value. Confession, observance and protection of the rights and freedoms of man and citizen is a duty of the state (Article 2 of the Constitution of the Russian Federation). Rights and freedoms of man and citizen are directly active. They make sense in the content and application of laws, the activities of the legislative and executive power, local self-government and are provided

justice (Article 18 of the Constitution of the Russian Federation).

It is in view of these constitutional provisions that the present period defines the tasks of the criminal process. So according to Art. 6 Code of Criminal Procedure the purpose of criminal proceedings is to protect the rights and legal interests of persons and organizations victims of crimes, as well as protection of personality from unlawful and unfounded accusations, condemnation, restrictions on her rights and freedoms.

Undoubtedly, criminal procedure activity is directed, including investigation, and on the investigation of a crime, the identification of a guilty person, since without this, we will not achieve the final goal of the criminal process, which is the proper application of the criminal law. Wherein the correct application of the norms of criminal law presupposes that: a) in First, the circumstances of the committed act are reliably established - this allows for the correct qualification of the committed act; b) during secondly, the person who committed the criminal act was reliably identified, and who should be punished. This means that every criminal case must be investigated comprehensively, fully and objectively.

At the same time, the norms of the Constitution of the Russian Federation and the Code of Criminal Procedure of the Russian Federation, which were indicated

above, have established in criminal proceedings the priority of protecting the rights and freedoms

¹¹¹Marchenko M.N. Theory of state and law / M.N. Marchenko. - 2nd ed., revised. and additional - M.: TE Velby, Publishing House Prospekt, 2008. P. 433-442; Varul P.A. Legal state: problems of lawmaking / P.A. Varul. - Tartu: Tart Publishing House. state un-ta, 1989. S.9-17; Pigolkin A.S. Theory of state and law: a textbook for academic undergraduate studies / A.S. Pigolkin, A.N. Golovistikov, Yu.A. Dmitriev. - 4th ed., revised. and additional - M.: Yurayt Publishing House, 2016. P. 253-259.

person. It is obvious that the idea of building a state of law, recognition of the priority of the individual is not compatible with the desire law enforcement agencies at any cost to disclose committed crimes, while sacrificing human rights and freedoms. Together with meanwhile, the desire to ensure the protection of human rights and freedoms should not create insurmountable obstacles to solving the crime. "Turn state to the individual makes relevant the question of the limits of intervention states in the rights and duties of a person, including in criminal legal proceedings, and on the provision of an opportunity to dispose represented by the rights through their consolidation, guarantees and mechanism ensuring, increasing the level of legal protection of all persons participating in criminal proceedings"¹¹² .

Criminal procedure regulation must be constantly subjected to analysis by scientific and practical workers, since incorrect legislative or enforcement steps can lead to long-term loss of the necessary balance between the protection of human rights and freedoms and the investigation of crimes¹¹³ .

The foregoing defines significant differences between operational search and criminal procedure activities. Attempts by any ways to erase existing boundaries between named species activities will lead to a significant reduction in the level of guarantees of protection human rights and freedoms in criminal proceedings, will create a threat of penetration unreliable information in the criminal process, on the basis of which subsequently, decisions will be made by the competent authorities, including number and decisions on guilt.

¹¹²Andreeva O.I. Limits of manifestation of optionality in criminal proceedings / O.I. Andreeva. - Tomsk: Publishing House Vol. un-ta, 2000.S. 6. ¹¹³Golovko L.V. The course of the criminal process [Electronic resource] // Consultant Plus: reference. legal system. Prof. version Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

Thus, we believe that the order in which the results are used operational-search activity in proving in criminal cases should be based on the following:

- the use of the results of the ORD in proving should not lead to mixing of operational-search and criminal procedural activities, substitution of criminal procedure means and methods of disclosure crimes by operational-search methods and methods, since this inevitably leads to a decrease in the level of guarantees for the protection of human rights and freedoms;

- implementation in criminal procedural proof of operational information should be carried out within the framework of the current legal regulation of evidentiary activity, taking into account the provisions of the theory evidence;

- use of the results of the ORD to establish the circumstances, provided for in Art. 73 of the Code of Criminal Procedure of the Russian Federation is possible only in an indirect form, those. after establishing the primary source of operational information, and extracting it from this source in the manner prescribed by the Code of Criminal Procedure of the Russian Federation;

- use by the bodies of preliminary investigation of operational information in evidence in criminal cases should be carried out with taking into account the provisions of the Constitution of the Russian Federation and the Code of Criminal Procedure of the Russian Federation, in accordance with which priority in criminal proceedings should be the protection of the rights and human freedoms.

2.2 Ensuring rights and freedoms when using promptly search information in the interests of criminal procedure proof

Considering the issues of using the results of the ORD in proving criminal cases, legal science and practice are primarily puzzled

improving the efficiency of crime investigation by promptly investigative possibilities.

This is evidenced, in particular, by the proposed in the literature a way to solve the problem of using the results of operational-search activities in proving, the essence of which is reduced to the normative fixing in the criminal procedural legislation of the provisions on production of operational-search activities. It is obvious that such in a way trying to facilitate the use of the results of the ORD in proving, by eliminating the boundary separating the results of the operational-search activities and evidence, which is the need procedural form of collecting evidence. So, for example, A.N. Sokolov believes that in the domestic criminal process one should consider special investigative actions ORM, under Art. 6 FZ on ORD¹¹⁴. In turn, D.S. Kucheruk notes that contained in Art. 89

The Code of Criminal Procedure of the Russian Federation prohibits the use of the results of an operational activity to prove factual the circumstances of the case has outlived its usefulness, does not meet the needs of the public legal development of Russia, generally recognized international legal standards for the use of such data in criminal proceedings¹¹⁵. Author indicates the need to incorporate the provisions of the Federal Law on ORD, departmental regulations governing the conduct of ORM¹¹⁶.

It should be noted that the criminal procedural legislation of a number of foreign countries is actively replenished with operational-search methods knowledge. In particular, according to Art. 93 Code of Criminal Procedure Ukraine, the investigator is authorized to personally carry out covert investigative (search) actions, information about the fact and methods of conducting

¹¹⁴Sokolov A.N. On the issue of special investigative actions // Law of Russia: experience, analysis, practice. - 2011. - No. 2. - P.56-65.

¹¹⁵Kucheruk D.S. Using the results of operational-search activity in proving in criminal cases of bribery: author. diss. ... cand. legal Sciences / D.S. Kucheruk. - Nizhny Novgorod, 2011. P.20. ¹¹⁶ibid. P.20.

which are not subject to disclosure . N.N. Kovtun appreciates experience of the Ukrainian legislator and believes that he radically and qualitatively resolved the issue of using OSD data in proving, providing for Code of Criminal Procedure of Ukraine the powers of the investigator to carry out covert investigative (detective) actions¹¹⁸ . A.F. Volynsky and V.V. Volynsky believe that the experience of Ukraine can be taken into account in the domestic criminal process¹¹⁹ .

In the domestic criminal process, the system of investigative actions in to a certain extent was expanded due to the operational-search elements. In particular, the Code of Criminal Procedure of the Russian Federation included such cognitive techniques operational-search nature as control and recording of negotiations (Article 186 Code of Criminal Procedure), obtaining information about connections between subscribers and (or)

subscriber devices (186.1 of the Code of Criminal Procedure of the Russian Federation).

In fact, control and recording of negotiations, obtaining information about connections between subscribers and (or) subscriber devices are operational-search activities, provided for by Art. 6 FZ about OSA. During the production of control and recording of negotiations, the investigator does not perform any cognitive operations and is limited only issuance of an appropriate decision with a petition, and after satisfaction of the petition by the court - sends it for execution to the relevant authority. The situation is similar with such an investigative action, such as obtaining information about connections between subscribers and (or) subscriber devices. Criminal procedure regulation

control and recording of negotiations (Article 186 of the Criminal Procedure Code of the Russian Federation), obtaining information about connections between subscribers and (or) subscriber devices (186.1

Code of Criminal Procedure of the Russian Federation) does not provide for any cognitive techniques, with the help of

¹¹⁷Code of Criminal Procedure of Ukraine [Electronic resource]: // Criminal process. Website of Konstantin Kalinovskiy. Electron. Dan. [B. m.]. - URL: http://www.kalinovsky-k.narod.ru/zakon_Ukraini_2012.htm (date of access: 11.02.2017).

¹¹⁸Kovtun N.A. Covert investigative (search) actions of the Code of Criminal Procedure of Ukraine as legitimate procedural means of proof // Criminal Justice. - 2013. - No. 4. - P.26-32.

¹¹⁹Volynsky A.F., Volynsky V.V. The new Code of Criminal Procedure of Ukraine is a response to the challenge modern crime or ...? // Russian investigator. - 2013. - No. 5. - P. 38.

which the investigator would perceive the traces of the crime. Besides, how rightly notes S.A. Shafer, in the provisions of Article 186 and Article 186.1 of the Code of Criminal Procedure RF investigative actions lack such a defining feature investigative action, as the direct extraction of information personally by the investigator through direct contact with traces¹²⁰.

However, we note that the system of investigative actions is open to replenishment with other cognitive methods. In the same time it, as a holistic education, imposes certain restrictions and prevents arbitrary attachment of new elements. S.A. Shafer defines the system of investigative actions as an ordered set cognitive actions interconnected by system-forming connections, providing the ability to display all the traces left by the event under study¹²¹. In another work, the author points out that the system investigative actions and each element included in it, must meet the following requirements:¹²²

- 1) Comply with the principles of criminal justice, i.e. include sufficient guarantees to achieve the objectives of the proceedings - establishing the truth and ensuring the legitimate interests of the participants investigative actions;
- 2) Have the ability to display the information contained in traces of the event, and turning it into evidence in the procedural sense;
- 3) The element introduced into the system cannot contradict the principles building a system and, at the same time, must be original, different from others and adapted to achieve a specific goal reception

¹²⁰Sheifer S.A. Collection of evidence in a criminal case: problems of legislation, theory and practice: monograph / S.A. Shafer. – M.: Norma: INFRA-M, 2015. P.71.

¹²¹Sheifer S.A. Collection of evidence in a criminal case: problems of legislation, theory and practice: monograph / S.A. Shafer. – M.: Norma: INFRA-M, 2015. S. 63.

¹²²Sheifer S.A. Investigative actions. Grounds, procedural order and evidentiary value / S.A. Shafer. - Samara: Samara University Publishing House, 2004. P.36-37.

trace display.

ORM cannot be included in the investigative system. According to Art. 12 FZ on OSA information about used or used in the conduct of covert operational-search activities forces, means, sources, methods, constitute a state secret. Therefore, cognitive operational-search methods cannot be regulated in detail in Code of Criminal Procedure of the Russian Federation. This means that there will be a high degree of discretion in activities of investigative bodies in the implementation of such cognitive tricks. In such conditions, there are no necessary guarantees, ensuring the legitimate rights and interests of persons involved in criminal process. According to the Code of Criminal Procedure of the Russian Federation, the ratio of pre-trial and judicial criminal proceedings assumes that during the preliminary investigation by the investigator (inquirer), evidence is formed, which will later become the subject of investigation and evaluation by the court. Since the subject of collecting evidence is the investigator (interrogating officer), then the methods used by him - investigative actions - must ensure transparency in obtaining information and its evidentiary authenticity; guarantee the constitutional rights of participants legal proceedings¹²³.

In addition, for example, ORMs such as test purchases, operational experiment, controlled delivery, operational implementation carried out only in a covert form, imply direct the perception of the event of a crime by the subjects who carry it out, which means that when included in the system, investigative actions will not be carried out by themselves investigator. In this case, an important feature of the investigative actions aimed at ensuring the completeness of the information received and creates additional guarantees of its reliability - direct

¹²³Kalnitsky V.V. Investigative actions: textbook / V.V. Kalnitsky, E.G. Larin. - Omsk: Omsk Academy of the Ministry of Internal Affairs of Russia, 2015. P.46.

extraction of information personally by the investigator through direct contact with traces. However, there is no practical value include in the system of investigative actions such ORM as a survey, identification of a person, inspection of premises, buildings, structures, terrain and vehicles. Code of Criminal Procedure of the Russian Federation already has similar cognitive techniques in the form of such investigative actions as interrogation, examination, recognition.

On the inadmissibility of expanding the system of investigative actions at the expense of operational-search methods of cognition are indicated in his dissertation by E.Kh. Pashaev. Due to the fact that the investigator in the criminal process must carry out an objective and impartial examination of the circumstances of the case, it is unacceptable to expand the list of investigative actions at the expense of operational search actions¹²⁴. Indeed, despite the fact that the legislator gives the investigator the function of prosecution, however, he is obliged comprehensively investigate the event of the crime. criminal procedure On the one hand, the law imposes on the investigating authorities the duty to carry out criminal prosecution against a person, writes S.A. Schaefer, a on the other hand, it requires him to investigate the circumstances of the case impartially, fully and objectively. In particular, art. 73 Code of Criminal Procedure of the Russian Federation in the subject of includes not only circumstances confirming the guilt of a person, but also circumstances excluding criminality and punishability of the act, circumstances that may lead to exemption from criminal responsibility and punishment.

Expansion of the list of investigative actions due to promptly search methods will lead to a situation where "the investigator will be carrying out activities contrary to his impartiality,

¹²⁴ Pashayeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. P.34.

¹²⁵ Sheifer S.A. Pre-trial proceedings in Russia: stages of development of the investigative, judicial and prosecutorial authorities / S.A. Shafer. - M.: Norma, 2015. P.127.

independence, involving him in the active fight against crime. Such the investigator is not entitled to form evidence and independently make procedural decisions on the case, otherwise too the risk of error is great, the threat of violation of human rights is too great”¹²⁶ .

Introduction into the criminal process of methods of operational-search characters to solve the problem of using the results of the ORD in criminal procedural evidence, as well as improving the efficiency investigation will lead to a mixture of criminal procedure and operational search activity, which in turn can significantly reduce the level of guarantees for the protection of the rights and freedoms of persons involved in the sphere of criminal process.

Diversity social destination criminal legal proceedings aimed at protecting both public and individual interests inevitably lead to a kind of natural “conflict of interest”¹²⁷. Indeed, in the process of criminal procedural activity has to solve a large complex conflicting tasks. How to provide both public and private interests? How to ensure the possibility of solving the crime while not depriving a person of guaranteed rights and freedoms? How to overcome opposition from suspected/accused persons, providing at the same time they have ample opportunities for protection? Allow these practice questions are quite difficult. inevitable in such a situation. is the problem of prioritization: it is necessary to make a choice those values, the protection of which seems to be the primary task. As we already noted the changes that took place in our country in the 1990s, the protection

¹²⁶ Pashayeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. P.35.

¹²⁷ Golovko L.V. The course of the criminal process [Electronic resource] // Consultant Plus: reference. legal system. Version Prof. Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

human rights and freedoms have been identified as a priority task in carrying out public activities, including in the field of criminal process. However, countering crime is an objective necessity of any state. Therefore, in criminal process should determine the acceptable means, methods, order activities, when using the results of the ORD in proving that, with on the one hand, will allow for the effective investigation of criminal affairs, and on the other hand, they will not lead to the destruction of all guarantees of the rights and freedoms person.

Analyzing the issues of using the results of the operational-search activities in proving in criminal cases, we come to the conclusion that that practitioners see as priorities, first of all, the tasks associated with the detection and investigation of crimes. Behind the aspiration develop a mechanism for using the results of the ORD in proving, overcome the problematic situation related to the issues of admissibility operational information, issues of personal protection, its rights and freedoms. We can observe that at the moment the balance between the interests of protecting human rights and freedoms and investigating a crime lost, and in favor of the latter.

The desire of law enforcement agencies to ensure at any cost disclosure and investigation of crimes has led to a situation where there is no critical attitude to the results of the ORD, when due The provided operational information is not verified in this way. So, for example, in case No. 1-424/13128 on charges of citizen K. crimes under Part.3 Article.30, h.1 Article. 228.1 of the Criminal Code of the Russian Federation in the materials case, there is information that during the implementation of operational test purchase bodies carried out an audio recording of the ORM. However audio recording by operational staff for unknown reasons was not provided to the investigator. Conducting preliminary investigations

criminal case, the investigator did not take into account the absence of an audio recording, retrieval of it from the operational-search authorities did not carry out. Differently criminal case No. 1-34/4¹²⁹ together with the results of the ORD operational employees provided a certificate stating:

“to submit an audio recording of the test purchase dated April 23, 2013 to citizen M. is not possible for technical reasons.”

However, no verification actions in relation to this circumstance were not carried out by the investigator. At the same time, it is obvious that this entry essential for establishing the circumstances of the case, including resolving the issue of the legality of the actions of operational officers when implementation of operational-search activities. In that case, we assume the investigator had to establish what exactly were the failures during the use of technical means with which they were associated. For check the reliability of such information, relevant questions should be were asked during interrogations by an operative officer who carried out technical support of ORM.

We believe that the problem is related to the fact that the preliminary investigations consider their position in the criminal process, before of everything as an organ of persecution. An effective step in overcoming The problematic situation will be strengthening the procedural independence of the investigator and removing him from the list of participants in the prosecution party¹³⁰. it will overcome the accusatory bias in the activities of the authorities preliminary investigation, and as a result contribute to the fact that the investigator, already at the stage of initiating a criminal case, will objectively timely and fully check the results of the operational-search activity, require operational bodies providing a sufficient volume of operational-search

¹²⁹Case No. 1-34/14 // Archive of the Oktyabrsky District Court of Tomsk. – 2014.

¹³⁰ Pashaeva E.Kh. Use of the results of operational-search activity in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. – Barnaul, 2017.S.191.

information.

However, this problem exists not only at the level of organs. preliminary investigation, but also at the court level. More and more cases of unreasonable obtaining of judicial decisions on the production of operational-search measures. courts due they do not examine the submitted operational materials, as a result why operational workers, using unreliable, far-fetched information, receive the necessary court decision for the production of the relevant operational search activities.

On the one hand, in the operational-search and criminal procedural legislation for such cases provides for the possibility of appealing both the actions of the operational-search authorities (Article 5 of the Federal Law on OSA) and decisions court (Article 123 of the Code of Criminal Procedure of the Russian Federation). But in order to exercise this right, it is necessary that a person was aware of the ORM being carried out against him. If it's about covert operational-search activities (for example, listening telephone conversations), the person in respect of whom it is carried out not at all aware that his phone is tapped or otherwise his rights are limited. So he just doesn't have a chance. protect yourself from illegal actions of law enforcement agencies.

In such a case, the prosecutor supervising the operative search activity remains the only guarantor of the protection of the rights person from illegal actions of employees of operational-search bodies. However, today the right of the prosecutor to appeal the court decisions authorizing the conduct of the ORM is not explicitly stated in the law¹³¹.

Speaking about the problem, the head of the department for supervision of production of inquiry and operational-search activities of the General Prosecutor's Office of the Russian Federation Sergey Viktorovich Ivanov, indicates that as a result

¹³¹Dytchenko G.V., Nikitin E.L. The legality of carrying out operational-search measures that limit the constitutional rights of citizens // Criminalist. - 2011. - #1(8). - P.108.

the lack of a statutory right of the prosecutor to appeal court decisions giving permission for the production of ORM began a contradictory practice is emerging - in some regions, courts take cassation and supervisory submissions of the prosecutor against court decisions on the conduct of ORM, in others - no¹³² .

Thus, a situation arises when, as a result of its supervisory activities, the prosecutor discovers a violation of the law when issuing judicial authorization for the production of ORM, but stop this violation and it cannot protect human rights. It becomes obvious that the prosecutor to appeal the court decisions on the conduct of the ORM should be clearly spelled out in the Code of Criminal Procedure of the Russian Federation and the Federal Law on OSA. However, the problem of limited control doesn't end there. It is systemic. With the aim of ensuring the protection of human rights and freedoms, more attention should be paid to development of a system of independent control over the operational-search activity. We believe that independent control by the authorities of the prosecutor's office will not only allow to significantly minimize possible provocative actions of operatives, ensure the protection of the rights citizens from unjustified criminal prosecution, but also increase the effectiveness of operational-search activities. After all, the prosecutor, being the official representative of the state on the side of the prosecution, interested in the formation of high-quality and objective evidence base in a criminal case.

It is obvious that such a proposal will raise a number of objections, which will be conditioned, in particular, by the fact that the development of the system of independent control can reduce the efficiency of the event, create risks of leakage information. However, we believe that the protection of human rights is above all other values, as it is written in the Constitution of the Russian Federation.

¹³²Ivanov S.V. Legislation on operational-search activity lags behind life // Criminal process. - 2016. - No. 3. - Electron. print version. publ. – URL: <http://e.ugpr.ru/article.aspx?aid=446457> (date of access: 20.03.2017).

Great opportunities for discretion in the operational-search activities (due to the lack of detailed legal regulation), as well as limited control require the need to check

compliance with the provisions of the Federal Law on Investigative Activities when using the results of the Investigative Activities. On the importance of verifying the legality of operational-search activities draws

attention of the Supreme Court of the Russian Federation. In paragraph 9 of the Decree of the Plenum of the Armed Forces of the Russian Federation "On court verdict" noted that the use as evidence

in a criminal case the results of operational-search activities

possible only if such measures are taken to

solving the problems specified in Article 2 of the Federal Law of August 12, 1995

of the year N 144-FZ "On operational-search activity", if available

grounds and subject to the conditions provided for in Articles 7 and 8

of the said Federal Law¹³³ .

In paragraph 7.1 of the Review of judicial practice in criminal cases on crimes, associated with illicit trafficking in narcotic drugs, psychotropic, potent and poisonous substances (Approved by the Presidium of the Supreme Court RF June 27, 2012) the Supreme Court stated: "In each case, when, as evidence in a criminal case, the results are used promptly

investigative activities, the courts are obliged to assess the possibility of using the results of these activities as evidence in a criminal case.

At the same time, it should be borne in mind that one of the conditions for the legality of conducting test purchase (and other activities) is compliance with the requirements

Part 7 Art. 8 of the Federal Law of the Russian Federation of 12 August 18, 1995

No. 144-FZ "On operational-search activities" (with subsequent changes and additions) ... "¹³⁴ .

¹³³On the court verdict [Electronic resource]: resolution of the plenum of the Supreme Court of the Russian Federation dated November 29, 2016 N 5 // ConsultantPlus: ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

¹³⁴ Review of judicial practice in criminal cases on crimes related to illicit trafficking in narcotic drugs, psychotropic, potent and poisonous substances (Approved by the Presidium of the Supreme Court of the Russian Federation on June 27, 2012) [Electronic resource]: judicial practice in criminal cases // ConsultantPlus: reference . legal 77

Conviction of a person based on data obtained in violation of the law unacceptable. This rule is constitutional. According to Part 2 of Art. 50 of the Constitution of the Russian Federation in the administration of justice is not allowed use of evidence obtained in violation of federal law¹³⁵. The Constitutional Court of the Russian Federation, resolving the issue of the use results of operational-search activities repeatedly in their decisions indicated that it was unacceptable to use evidence obtained in violation of federal law. Violation of regulations regulating the production of operational-search measures, excludes the possibility of using the results of the operational-search activity in criminal proceedings, since formed on their basis evidence by virtue of Part 2. Article 50 of the Constitution of the Russian Federation cannot be used in criminal proceedings. Evidence such as indicates the Constitutional Court of the Russian Federation, are recognized as having no legal force and cannot be used to substantiate the accusation¹³⁷.

However, in most criminal cases, neither the courts nor the authorities preliminary investigations do not pay due attention to verification compliance with the provisions of the Federal Law on ORD in the production of ORM. Learning Practice indicates that when using the results of the ORD in proving

system. - Arbitrage practice. – Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

¹³⁵Constitution of the Russian Federation: adopted by the All-Nar. vote of 12 Dec. 1993 (subject to amendments dated July 21, 2014 No. 11-FKZ) // Collected Legislation of the Russian Federation. - 08/04/2014. - No. 31. - Art. 4398.

¹³⁶On the refusal to accept for consideration the complaint of citizen Barkovsky Konstantin Olegovich to the violation of his constitutional rights by the fourth part of Article 127 of the Code of Criminal Procedure of the RSFSR, paragraph 1 of the first part of Article 6 and paragraph 3 of the first part of Article 7 Federal Law "On operational-search activity" [Electronic resource]: determination of the Constitutional Court of the Russian Federation of December 1, 1999 N 211-O // ConsultantPlus: ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university; On the refusal to accept for consideration the complaint of citizen Potapov Alexander Vladimirovich about the violation of his constitutional rights by certain provisions of the Federal Law "On operational-search activity" [Electronic resource]: determination of the Constitutional Court of the Russian Federation of March 06, 2001 N 58-O // ConsultantPlus: ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

¹³⁷Bakhta A.S. Issues of operational-search activity in the decisions of the Constitutional Court of the Russian Federation / A.S. Bakhta, O.A. Vagin, A.E. Chechetin. - Khabarovsk: Far Eastern Law Institute of the Ministry of Internal Affairs of Russia, 2012. P. 48.

at the pre-trial stage, verification of compliance with the Federal Law on OSA in 72% of cases studied was not reflected in the procedural documents. indications that the results ORDs obtained in accordance with the law are often contained only in submitted operational documents.

At the judicial stage, the picture changes somewhat for the better. AT In 67% of the studied criminal cases, the verdicts contain indications that the results of the ORD were obtained in accordance with the provisions of the Federal Law on ORD. Wherein such indications are usually expressed as a general phrase, without reference to norms of the law and materials of the case. An example is the sentence Leninsky District Court of Tomsk in case No. 1-455/15, in which the court, referring to the materials of the operational experiment, limited himself to only an indication that "... conducted on 22.04.2015 operational-search the "test purchase" event complies with the provisions of the Federal Law "On operational-search activity. Results her properly attached to the case file"¹³⁸.

Special attention to preliminary investigation bodies and courts should be given to verifying the legality of such operational-search activities such as test purchase and operational experiment. Federal Law on ORD article 6 establishes that the bodies (officials) carrying out operational-search activity, it is prohibited to incite, persuade, induce, directly or indirectly, to commit unlawful acts (provocation)¹³⁹. Features of the production of a test purchase and operational experiment involves the creation of controlled law enforcement officers of the conditions for committing crimes. In this regard, in their production, the question arises of compliance with borders between lawful actions and provocation of a crime.

The problem of delimitation of legal operational-search activities

¹³⁸Case No. 1-455/15 // Archive of the Leninsky District Court of Tomsk. - 2015.

¹³⁹ On the operational-search activity in the Russian Federation: Law No. 2506-1 dated March 13, 1992 (as amended on July 2, 1992) // Vedomosti SND RF and RF Armed Forces. - 04/23/1992. - No. 17. - art. 892.

and provocations has been studied in detail in the literature¹⁴⁰. Therefore, we consider possible in the present work will be limited only to an indication of the criteria such a distinction. Separating provocation from lawful implementation operational-search activities, European Court of Human Rights (hereinafter referred to as the ECHR) formulated its definition, according to which: provocation on the part of the police occurs when officers law enforcement agencies or persons acting on their behalf limited to investigating criminal activity primarily passively, but exert such an influence as to incite to commit a crime that would not otherwise have been committed, in order to expose crime, namely to obtain evidence of its commission and begin criminal prosecution¹⁴¹.

Based on the definition, criteria were identified that the ECtHR uses when distinguishing between provocation and lawful operational investigative measures (see, for example, the judgment of the ECtHR in the case of Veselov and Others v. the Russian Federation¹⁴², ECtHR judgment on case of Bannikova v. the Russian Federation of 4 November 2010 (complaint no.

¹⁴⁰Kandaurov S.I. On the issue of delimiting the operational experiment and test purchase from provocation or incitement // Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia. - 2014. - No. 3 (27) - P. 93-97; Nazarov A.D. Provocations in the operational search activity / A.D. Nazarov. - M.: Publishing house "Yurlitinform", 2010. 43-67; Astafiev Yu.V. Operative experiment and provocation: criteria for delimitation // Fifty years of the Department of Criminal Procedure of the Ural State Law Academy (SUI): materials of international, scientific - practical conf. Yekaterinburg, 2005, part 1, pp. 51-57; Savinsky A.V., Bakun V.M. Differentiation between operational experiment and provocation of a bribe // Legitimacy. - 2010. - No. 7. - S. 46-49; Radachinsky S.N. Provocation of a crime as a complex institution of criminal law: problems of theory and practice: diss. ... Doctor of Law Sciences / S.N. Radachinsky. - Nizhny Novgorod, 2011.

¹⁴¹ See, for example: Judgment of the ECtHR in the case of Ramanauskas v. Lithuania of February 05, 2008 (complaint N 74420/01) [Electronic resource] // Consultant Plus: ref. legal system. - Prof. version. - Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

¹⁴² Judgment of the ECtHR in the case "Veselov and others v. the Russian Federation" of October 2, 2012 (complaints No. 23200/10, 24009/07 and 556/10) [Electronic resource] // ConsultantPlus: Ref. legal system. - Prof. version. - Electron. Dan. - M., 2017. - Access from the local network b-ki Tom. state university

18757/06)¹⁴³, ECtHR judgment in the case of Nosko and Nefyodov v. Russian Federation" dated January 30, 2015 (complaints nos. 5753/09 and 11789/10)¹⁴⁴). The issue of provocation in the implementation of operational search activities was studied in detail by T.V. Trubnikova¹⁴⁵. Analysis relevant decisions of the ECtHR allowed the author to identify the criteria for on which the courts must decide whether the crime was committed without the intervention of the authorities or there is a provocation on the part of law enforcement agencies. So, these criteria are¹⁴⁶:

- objective suspicions that the person is involved in a criminal activity or predisposed to committing a crime;
- whether the behavior of law enforcement agencies in the implementation of operational-search activities are predominantly passive, is it just operational officers "joined" in the commission of a criminal punishable act or provoked it;
- was the crime committed voluntarily, was it forced the applicant for the crime.

For several years the European Court has pointed to the problem groundlessness of carrying out ORM in the Russian Federation. For example, in the judgment of the ECtHR in the case of Yeremtsov and Others v. Russia of November 27, 2014, the court stated that

¹⁴³ Judgment of the ECtHR in the case "Bannikova against the Russian Federation" dated November 4, 2010 (complaint No. 18757/06) [Electronic resource] // ConsultantPlus: Ref. legal system. – Prof. version. – Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

¹⁴⁴Judgment of the ECtHR in the case of Nosko and Nefedov v. the Russian Federation of January 30, 2015 (complaints No. 5753/09 and 11789/10) [Electronic resource] // ConsultantPlus: Ref. legal system. – Prof. version. – Electron. Dan. - M., 2017. - Access from the local network Nauch. b-ki Tom. state university

¹⁴⁵ See, for example: Trubnikova T.V. Delimitation of provocation from lawful operational-search measures in the practice of the ECtHR and the courts of the Russian Federation // Criminal process. 2012. No. 12. P. 44–52; Trubnikova T.V. The right to a fair trial: legal positions of the European Court of Human Rights and their implementation in the criminal process of the Russian Federation: Textbook / T.V. Trubnikov. - Tomsk: Publishing House Vol. un-ta, 2011.S.233-238.

¹⁴⁶Trubnikova T.V. The prohibition on the use of data obtained as a result of the provocation of a crime as one of the elements of the right to judicial protection, and guarantees of its implementation in the criminal process of the Russian Federation // Bulletin of the Tomsk State University. Right. - 2015. - No. 2 (16). - P.109-127.

that “the absence in the legal system of the Russian Federation of a clear and predictable procedure for authorizing test purchases is still is a structural problem that exposes applicants to arbitrariness on the part of employees of the internal affairs bodies, and domestic courts cannot exercise effective judicial review of their complaints of entrapment”¹⁴⁷ .

In the case of *Veselov and Others v. the Russian Federation*, ECtHR noted that conducting test purchases and operational experiments is under the sole control of the authorities responsible for operational-search activity, and this indicates a systemic problem of the lack of guarantees against provocation¹⁴⁸ .

It should be recognized that the operational-search legislation Russian Federation does not contain proper guarantees against provocation committing a crime. Not only the European Court draws attention to deficiencies in the legal regulation of operational-search activities in Russia. In the domestic legal literature, scientists are also puzzled this problem. In particular, A.Yu. Shumilov writes that in the regulation there is no proper system for operational-search activities regulatory prohibitions on the commission of certain detective actions, making appropriate decisions, the use of specific forces, means and methods¹⁴⁹ . There is a significant need to provide for criminal legal proceedings a number of guarantees that would exclude the use in proof in a criminal case of evidence obtained as a result of

¹⁴⁷Judgment of the ECtHR in the case “*Eremtsov and others v. Russia*” dated November 27, 2014 (complaints no. . legal system. – Prof. version. – Electron. Dan. - M., 2017. -

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¹⁴⁸Judgment of the ECtHR in the case of *Veselov and others v. the Russian Federation* of October 2, 2012 (complaints no. legal system. – Prof. version. – Electron. Dan. - M., 2017. -

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¹⁴⁹Shumilov A.Yu. Criminal-legal prohibition on falsification of the results of operational-search activities (commentary on the new prescriptions of Article 303 of the Criminal Code of the Russian Federation) // *Operative (detective)*. - 2013. - No. 1 (34). - P.60.

provocation crime. The literature offers a fairly extensive set of measures, the implementation of which will make it possible to establish guarantees against provocations. These include, in particular: establishing independent control over the procedure for conducting a test purchase and an operational experiment¹⁵⁰; fixing in the Code of Criminal Procedure of the Russian Federation a norm that establishes rules according to which the evidence obtained as a result of provocations should be excluded from the criminal case¹⁵¹; security the operation of the adversarial principle when courts check statements of provocation¹⁵² ; establishing criminal liability for all types of provocation (at the moment the Criminal Code of the Russian Federation establishes criminal liability for the provocation of a bribe or commercial bribery - Article 304 of the Criminal Code of the Russian Federation)¹⁵³ .

It should also be taken into account that the question of the possibility of establishing bodies of preliminary investigation and the court of presence/absence provocative actions in the implementation of ORM primarily depends on the quality of fixing the course and results of operational-search activities. Those. on the quality of work of operational units. Operational staff must understand that on the materials of operational-search activities on certain elements of crimes, key evidence is formed

¹⁵⁰Judgment of the ECtHR in the case of Veselov and others v. the Russian Federation of October 2, 2012 (complaints no. legal system. – Prof. version. – Electron. Dan. - M., 2017. -

Access from the local network b-ki Tom. state university; Pashaeva E.Kh. Using the results of operational-search activities in making procedural decisions (on the example of criminal cases on the sale of narcotic drugs, psychotropic substances or their analogues): diss. ... cand. legal Sciences / E.Kh. Pashaev. - Barnaul, 2017. S. 15-16.

¹⁵¹Zakotyansky A.S. Problems of using non-procedural information in proving in criminal cases: diss. ... cand. legal Sciences / A.S. Zakotyansky. – Samara, 2015.S. 126-127.

¹⁵²Trubnikova T.V. The prohibition on the use of data obtained as a result of the provocation of a crime as one of the elements of the right to judicial protection, and guarantees of its implementation in the criminal process of the Russian Federation // Bulletin of the Tomsk State University. Right. - 2015. - No. 2 (16). - P.109-127; Lapatnikov M.V. Theoretical and Applied Issues of Delimiting Provocation from a Lawful Operative-Search Measure, Taking into Account the Practice of the European Court of Human Rights // Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia. - 2014.- No. 2 (26). - S. 100.

¹⁵³Nazarov A.D. Provocations in the operational-search activity / A.D. Nazarov. - M.: Publishing house "Yurlitinform", 2010. P.16.

in criminal proceedings (Table 1).

Table 1 - Information about the evidence used by the courts in issuing guilty verdict in criminal cases related to drug trafficking and bribery

	% of total number of cases
guilty verdict based exclusively on the evidence generated using operational search information	67%
guilty verdict based on the evidence formed using operational-search information, as well as other evidence collected by the investigator in the course of preliminary investigation	29%
The guilty verdict did not contain reference to the evidence, formed using operational-search information	four%

It must be admitted that in practice, due attention is not paid to attention to receiving and fixing information that would allow check the legality of the operational-search activities carried out. An analysis of judicial practice has shown that in the activities of law enforcement organs, there are negative aspects that can lead to conviction of a person on the basis of data obtained as a result of provocation. In First, criminal cases do not contain the necessary information to allow to establish that the person in respect of whom the ORM was carried out (verification procurement, operational experiment) is already carrying out a criminal activity or preparing to carry it out. Often in materials criminal case, there are only instructions from the employees of the operational departments that they have information about the involvement of a person in criminal activity. At the same time, no source of such information, nor specific operational-search activities, as a result

which such information was obtained. So, in the criminal case No. 1-304/2013 in the decision on the conduct of the operational-search measure the following is indicated: "In department 4 of the OS of the Federal Drug Control Service of Russia for the Tomsk Region there is operational information regarding a Slavic man appearance named Dmitry, about 25 years old, who sells the drug hashish in the city of Tomsk"¹⁵⁴. Later on on preliminary investigation, as well as at the court session, the said information has not been verified. However, in order to recognize a test purchase or operational experiment lawful it is necessary to establish that before production of operational-search measures (test purchase or operational experiment) there was evidence to suggest that a person is involved in criminal activity or is predisposed to committing a crime. So just declare that face does not engage in criminal activity enough. Operational-search authorities must provide data that would confirm that they have there really were grounds for making a test purchase or operational experiment. Such data must be verifiable.

Secondly, during the production of ORM, no data is recorded that would allowed to establish the degree of activity of law enforcement agencies, and also data that would confirm that the person has committed a crime voluntarily and that no pressure was put on him to induce him to committing a crime. In 64% of criminal cases in the course of production test purchase or operational experiment was not carried out technical support of operational-search activities through audio and/or video recordings. In addition, in the vast majority of criminal cases, law enforcement agencies do not pay due attention and do not fix preliminary negotiations and contacts of the agent with the person in respect of which an operational search is subsequently carried out event. In the criminal case in this respect there are only general

¹⁵⁴Case No. 1-304/13 // Archive of the Leninsky District Court of Tomsk. – 2013.

directions, not allowing to install

degree

activity

law enforcement agencies in the implementation of ORM, as well as the lack of pressure and coercion of a person to commit a crime. For example, by criminal case No. 1-406/14, the protocol of interrogation of the "buyer" only the following information: "... I called K. at the phone number 8-913-324-55-87" and agreed with him to purchase the drug hashish. K. told me to drive up to the asphalt plant..."¹⁵⁵.

Other information

regarding the negotiations between the "buyer" and K., there is no evidence in the criminal case. Obviously, based on such data, it is impossible to establish whether voluntary commission of a crime or a "buyer", for example, repeatedly persuaded K. to sell him drugs, tried to get him pity and so on.

In connection with the above, it is advisable in the production of a test procurement and operational experiment follow the following guidelines:

1) Operational-investigative bodies need to properly record the circumstances that gave rise to the operational-search activity: it is necessary to fix the previous conducting an ORM, the behavior and actions of the person against whom an operational-search event is planned, as well as preliminary contacts and negotiations of the "agent" with such a person. For these purposes operational workers should carry out a complex of ORM (observation, interrogation, making inquiries, wiretapping), which allows to establish and consolidate significant information¹⁵⁶. Wherein it should be possible to verify the validity of such information in within the criminal process.

2) In each case, it is necessary to organize support for operational

¹⁵⁵Case No. 1-406/14 // Archive of the Leninsky District Court of Tomsk. - 2014.

¹⁵⁶Ivanov V.V., Kholopova E.N. Using the results of the operational-search activity "listening of telephone conversations" in identifying and solving crimes in the field of illicit trafficking in narcotic drugs, psychotropic substances and their analogues // Russian investigator. - 2013. - No. 9. - P.33-36.

search activities by audio and/or video recording.

3) In decisions on the production of a test purchase or operational experiment, it is necessary to specify specific operational search activities and the information received, which served as the basis for the production of a test purchase or operational experiment.

Domestic practice on the issue of provocation in the process implementation of operational-search activities at the moment is not established, is contradictory. However, there are also positive points. Russian judicial practice at the moment is in development and, in general, is moving towards a more accurate and adequate perception and implementation of those criteria for distinguishing provocation and lawful ORM, which were formulated in the decisions of the ECtHR. AT In particular, it should be noted that even 4–7 years ago, courts often did not actually investigate the question of whether the results of the OSA, used in evidence in criminal cases, the result of a provocation by law enforcement agencies, even if the defense referred on this circumstance, or did it purely formally. AT In other cases, the court generally refused to distinguish between a provocation and a lawful operational-search measure”¹⁵⁷ .

A study of published jurisprudence showed that in recent over the years, courts have begun to pay more attention to issues of provocation in implementation of the ORD. However, it should be noted that the protection of persons from unlawful and unfounded accusation based on evidence, received as a result of provocative actions of law enforcement bodies, in most cases carried out by correcting errors the previous stage. Issues of provocation by the courts of first instance

¹⁵⁷Trubnikova T.V. Delimitation of provocation from lawful investigative measures in the practice of the ECHR and the courts of the Russian Federation // Criminal process. 2012. No. 12. P. 44–52.

rarely affected, and often only if there were relevant defense statements. At the stage of preliminary investigation, law enforcement agencies do not pay attention to this issue at all. Investigators are simply ignoring statutory requirement to check admissibility evidence. "Practice shows that investigators and interrogators are almost universally and frequently denied satisfaction petitions of suspects, accused for recognition of evidence inadmissible and even if there are reasonable doubts about the admissibility evidence shifts the decision of this issue to the court. By own initiative, they will not recognize the evidence as inadmissible." 158

Recall that the removal from the criminal case of evidence obtained in violation of the law must be provided with appropriate officials (in accordance with Article 88 of the Code of Criminal Procedure of the Russian Federation, the prosecutor, the investigator, the inquirer and the court have the right to recognize the evidence as inadmissible both on their own initiative and at the request of a participant in a criminal process). As the Constitutional Court of the Russian Federation pointed out, the named rule follows from articles 18 and 46 of the Constitution of the Russian Federation, according to which human rights and freedoms and the citizen are provided with justice, and is also dictated by the article 21 of the Constitution of the Russian Federation by the principle of protecting the dignity of the individual, implying, in particular, the obligation of the state to provide everyone as an equal subject, the opportunity to defend their rights by all is not prohibited by law and to argue with the state in the face of any of its bodies and officials, including those carrying out investigations on criminal cases¹⁵⁹. And this means that law enforcement agencies starting

¹⁵⁸Berezina E.S. Problematic issues of exclusion of inadmissible evidence in pre-trial proceedings // Russian investigator. - 2013. - No. 5. - P. 11.

¹⁵⁹On the refusal to accept for consideration the complaint of citizen Potapov Alexander Vladimirovich about the violation of his constitutional rights by certain provisions of the Federal Law "On operational-search activity" [Electronic resource]:

from the stage of initiating a criminal case must actively carry out work for verification of operational-search information. Bodies pre investigations and courts, whether or not the relevant statement by the defense, must independently verify the legitimacy implementation of ORM (including establishing the presence/absence of provocations by law enforcement agencies) and eliminate from criminal case all evidence obtained in violation of the law.

In conclusion, it would be appropriate, in our opinion, to cite the following judgments of B. T. Bezlepkin: "In any society, the ratio of investigation and justice serves as one of the most sensitive indicators of his democratic health. Open the gateways of operational-investigative information to the sphere of justice and its based on the use of weapons of criminal repression - this means curtailing the most important constitutional guarantees of the rights of a free individual, and to transform the state itself from a democratic one into a purely police one"¹⁶⁰ . The state should pay special attention to the creation of a system of guarantees protection of human rights and freedoms, when using the results of the operational interests of criminal procedural evidence. Conducted research showed that such a system of guarantees in our country is not adequately formed. A set of measures to improve it, in particular, should be directed to:

- expansion of the system of independent control over the operational-search activity;
- increasing the objectivity of the bodies of preliminary investigation for removal of the investigator (inquirer) from the participants of the party accusations;
- creation of guarantees that would exclude the use in proving

Determination of the Constitutional Court of the Russian Federation of March 06, 2001 N 58-O // ConsultantPlus: Ref. legal system. Prof. version Electron. Dan. M., 2017. Access from the local network Nauch. b-ki Tom. state university

¹⁶⁰Bezlepkin B.T. Criminal process in Russia: study guide / B.T. Bezlepkin. – M.: Prospekt, 2004.S. 119.

in a criminal case evidence obtained as a result of provocation crimes;

- fixing the obligations of the bodies of preliminary investigation and court to verify the legality and reliability of the receipt operational-search information, on the basis of which evidence, as well as reflect the results of such verification in procedural documents.

Conclusions for the second chapter:

1. The problem of using the results of the ORD in the process of proof in criminal cases in science it is proposed to solve in various ways. scatter opinions on this issue range from a total ban use in proving the results of operational-search activities, pending the removal of all obstacles to such use ORD results. It is obvious that such a range of opinions on the relative the issue under study, as well as the imperfection of legal regulation creates an obstacle to the effective use of the results of the OSA in proof.

2. The study of criminal cases considered by the district courts of the city of Tomsk allows us to conclude that practitioners the use of operational information in proof does not follow any unified theoretical concept. In practice, the use results of the OSA in proving, as well as specific procedural actions and the decisions that investigators make to form evidence using operational information, depend on the nature of the data obtained and are determined in each specific case.

3. In order to ensure the rights of persons involved in the sphere of criminal process, the use of the results of operational-search activities in criminal proceedings should be carried out taking into account the following provisions:

- the use of the results of the ORD in proving should not lead to mixing of operational-search and criminal procedural activities, substitution of criminal procedure means and methods of disclosure crimes by operational-search methods and methods;

- implementation in criminal procedural proof of operational information should be carried out within the framework of the current legal regulation of evidentiary activity, taking into account the provisions of the theory evidence;

- use of the results of the ORD to establish the circumstances, provided for in Art. 73 of the Code of Criminal Procedure of the Russian Federation is possible only in an indirect form, those. after establishing the primary source of operational information, and extracting it from this source in the manner prescribed by the Code of Criminal Procedure of the Russian Federation;

- use by the bodies of preliminary investigation of operational information in evidence in criminal cases should be carried out with

taking into account the provisions of the Constitution of the Russian Federation and the Code of Criminal Procedure of the Russian Federation, in accordance with which priority in criminal proceedings should be the protection of the rights and human freedoms.

4. Analyzing the issues of using the results promptly search activity in proving in criminal cases, we come to the conclusion that practitioners see priority, before in general, tasks related to the disclosure and investigation of crimes. An effective step in overcoming a problematic situation would be to strengthen procedural independence of the investigator and removing him from the members of the prosecution. This will overcome the accusatory bias in the activities of the bodies of preliminary investigation, and as a result contribute to the fact that the investigator is already at the stage of initiating criminal of the case will objectively, timely and fully verify the results of the OSA, require operational entities to provide sufficient operational intelligence information.

5. In turn, the operational-search authorities should take into account that on the materials of operational-search activities key evidence in the criminal process is formed. That's why the results of the ORD should contain the necessary amount of information, which would allow, within the framework of criminal proceedings, to verify the authenticity, and as well as the legitimacy of its receipt.

6. The operational-search legislation of the Russian Federation does not contains due safeguards against provocation to commit a crime. Conducting test purchases and operational experiments is under full control of the bodies carrying out operational-search activity. Protection of individuals from unlawful and unfounded accusations of on the basis of evidence obtained as a result of provocative actions law enforcement agencies, in most cases carried out through correction of errors of the previous stage. This indicates a systemic the problem of lack of guarantees against provocation.

7. In criminal proceedings, it is necessary to determine the permissible means, methods, procedures, when using the results of the OSA in proof, which, on the one hand, will allow for effective investigation of criminal cases, and on the other hand, will not lead to the destruction of all guarantees of human rights and freedoms. The conducted research showed that a system of guarantees for the protection of human rights and freedoms, when using results of the operational-search activity in the interests of criminal procedural evidence in our the state is not properly formed. A set of measures for its improvement, in particular, should be directed to:

- expansion of the system of independent control over the operational-search activity;

- increasing the objectivity of the bodies of preliminary investigation for removal of the investigator (inquirer) from the participants of the party accusations;

- creation of guarantees that would exclude the use in proving

in a criminal case evidence obtained as a result of provocation crimes, namely: the establishment of an independent control of the order conducting a test purchase and operational experiment; anchoring in Code of Criminal Procedure of the Russian Federation of the norm, which establishes the rules according to which evidence obtained as a result of entrapment must be excluded from a criminal case; ensuring the operation of the principle of adversarial verification by courts of allegations of provocation; establishing a criminal responsibility for all types of provocation;

- fixing the obligations of the bodies of preliminary investigation and court to verify the legality and reliability of the receipt operational-search information, on the basis of which evidence, as well as reflect the results of such verification in procedural documents.

CONCLUSION

Our study allowed us to draw the following conclusions:

1. First attempts at regulation of use

the results of the operational-search activity in the interests of criminal proceedings were carried out at the beginning of the 20th century.

2. Development of legal regulation of the use of promptly

search information in the criminal process at the present stage

indicates the transition of regulation from the sub-legislative level to the level

law. At the same time, normative regulation of the use of results

ORD in the criminal process develops mainly within the operational search legislation.

3. At the moment, the Code of Criminal Procedure of the Russian Federation does not contain specific

instructions regarding the procedure for using the results of the OSA in

proof. The absence of a clear position from the legislator inevitably creates

ROW difficulties in practical activities. Necessary

improve criminal procedure legislation for

ensuring the rational use of forces and means promptly

search activity. To this end, it is necessary to provide in the Criminal Procedure Code of the Russian Federation

norms that would regulate the procedure for using the results of the OSA in

proof, that is:

- consolidated the right of operational-search bodies to provide

the results of the operational-search activity (at the moment, the existence of such a right has to be judged

based on the norms of the Federal Law on OSA, however, this regulatory act does not regulate

social relations in criminal

legal proceedings);

- established the obligation of the preliminary investigation bodies

consider the submitted operational materials and take on them

appropriate procedural decision;

-clearly determined the ratio of the results of the ORD and evidence;

-determined the mechanism of use in evidentiary activity

information obtained by investigative means.

four. Circumstance Finding Activities

committed crime, is carried out not only within the framework of criminal process. Cognition of the crime event at the expense of other special types knowledge goes beyond the scope of criminal procedure.

Operational-search activity with its inherent forces and methods is an effective means of identifying, detecting signs crimes.

5. Signs of operational-search activity are:

exclusively state-legal nature of the operational-search activities; carried out through the conduct of operational-search events; carried out in public and private forms; carried out to achieve the goal, legislatively formulated in the Federal Law on OSA.

6. The importance of operational-search information for criminal process is connected with the peculiarities of operational-search activity, increasing its cognitive capabilities in comparison with criminal procedural evidence. These features should include:

- a) the possibility of direct perception by employees operational units of the crime event;
- b) the possibility of carrying out operational-search knowledge in conspiracy conditions;
- c) the lack of detailed legal regulation of cognitive techniques and methods of operational-search activity.

The above features of operational-search knowledge make it effective means of combating crime, preventing and suppression of criminal activity, search for the perpetrators. However results operational search activities independent have no evidentiary value. As a result, there is a special

the problem of the place and significance in the criminal process of the results obtained in during the implementation of operational-search activities.

7. The methodological basis of the concept of evidence is analysis criminal procedural evidence from the standpoint of the theory of reflection and information approach. Crime as a phenomenon of objective reality, interacting with the environment, reflected in it in the form of material and ideal traces. prisoners in ideal and material traces, information becomes content evidence after it has been obtained in the manner prescribed criminal procedure law (i.e. through the production of investigative and other procedural actions provided for by the Code of Criminal Procedure of the Russian Federation) and are clothed in form prescribed by law (witness testimony, expert opinion and etc.). This unity of content and form is evidence in criminal procedural sense.

8. The results of the ORD can certainly meet the requirement relevance, that is, contain information about the facts and circumstances that have significance for the criminal case. However, the results of the ORD are formed for within the framework of the criminal process, not from the sources established by the criminal procedural law, outside the conditions and procedure provided for by it, subjects of operational-search activity, and not criminal procedural activities. As a result, they cannot be considered responsible. admissibility requirement.

9. Having considered the ratio of the results of the operational-search activities and evidence, we have established the similarity of their epistemological, information nature and the difference in the legal regimes for their receipt. Admissibility is the criterion by which a distinction is made evidence and results of operational-search activities.

10. The problem of using the results of the ORD in the process of proof in criminal cases in science it is proposed to solve in various ways. scatter opinions on this issue range from a total ban

use in proving the results of operational-search activities,
pending the removal of all obstacles to such use
ORD results. It is obvious that such a range of opinions on the relative
the issue under study, as well as the imperfection of legal regulation
creates an obstacle to the effective use of the results of the OSA in
proof.

11. The study of criminal cases considered by the district courts of the city of Tomsk allows us to conclude that practitioners
the use of operational information in proof does not follow any
unified theoretical concept. In practice, the use
results of the OSA in proving, as well as specific procedural actions
and the decisions that investigators make to form
evidence using operational information, depend on
the nature of the data obtained and are determined in each specific case.

12. In order to ensure the rights of persons involved in the sphere of criminal process, the use of the results of operational-search activities in criminal proceedings should be carried out taking into account the following provisions:

- the use of the results of the ORD in proving should not lead to mixing of operational-search and criminal procedural activities, substitution of criminal procedure means and methods of disclosure crimes by operational-search methods and methods;

- implementation in criminal procedural proof of operational information should be carried out within the framework of the current legal regulation of evidentiary activity, taking into account the provisions of the theory evidence;

- use of the results of the ORD to establish the circumstances, provided for in Art. 73 of the Code of Criminal Procedure of the Russian Federation is possible only in an indirect form, those. after establishing the primary source of operational information, and extracting it from this source in the manner prescribed by the Code of Criminal Procedure of the Russian Federation;

- use by the bodies of preliminary investigation of operational information in evidence in criminal cases should be carried out with

taking into account the provisions of the Constitution of the Russian Federation and the Code of Criminal Procedure of the Russian Federation, in accordance with which

priority in criminal proceedings should be the protection of the rights and human freedoms.

13. Analyzing the issues of using the results promptly search activity in proving in criminal cases, we come to the conclusion that practitioners see priority, before in general, tasks related to the disclosure and investigation of crimes. An effective step in overcoming a problematic situation would be to strengthen procedural independence of the investigator and removing him from the members of the prosecution. This will overcome the accusatory bias in the activities of the bodies of preliminary investigation, and as a result contribute to the fact that the investigator is already at the stage of initiating criminal of the case will objectively, timely and fully verify the results of the OSA, require operational entities to provide sufficient operational intelligence information.

14. In turn, the operational-search authorities should take into account that on the materials of operational-search activities key evidence in the criminal process is formed. That's why the results of the ORD should contain the necessary amount of information, which would allow, within the framework of criminal proceedings, to verify the authenticity, and as well as the legitimacy of its receipt.

15. The operational-search legislation of the Russian Federation does not contains due safeguards against provocation to commit a crime. Conducting test purchases and operational experiments is under full control of the bodies carrying out operational-search activity. Protection of individuals from unlawful and unfounded accusations of on the basis of evidence obtained as a result of provocative actions law enforcement agencies, in most cases carried out through

correction of errors of the previous stage. This indicates a systemic the problem of lack of guarantees against provocation.

16. In criminal proceedings, the permissible means should be determined, methods, procedures, when using the results of the OSA in proof, which, on the one hand, will allow for effective investigation of criminal cases, and on the other hand, will not lead to the destruction of all guarantees of human rights and freedoms. The conducted research showed that a system of guarantees for the protection of human rights and freedoms, when using results of the operational-search activity in the interests of criminal procedural evidence in our the state is not properly formed. A set of measures for its improvement, in particular, should be directed to:

- expansion of the system of independent control over the operational-search activity;

- increasing the objectivity of the bodies of preliminary investigation for removal of the investigator (inquirer) from the participants of the party accusations;

- creation of guarantees that would exclude the use in proving in a criminal case evidence obtained as a result of provocation crimes, namely: the establishment of an independent control of the order conducting a test purchase and operational experiment; anchoring in Code of Criminal Procedure of the Russian Federation of the norm, which establishes the rules according to which evidence obtained as a result of entrapment must be excluded from a criminal case; ensuring the operation of the principle of adversarial verification by courts of allegations of provocation; establishing a criminal responsibility for all types of provocation;

- fixing the obligations of the bodies of preliminary investigation and court to verify the legality and reliability of the receipt operational-search information, on the basis of which evidence, as well as reflect the results of such verification in procedural documents.

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APPENDIX A

Statistics regarding the use of the results operational-search activity in proving

The study was based on a selective analysis criminal cases on crimes related to illegal sale drugs, giving and receiving bribes. Criminal cases considered by district courts of Tomsk in 2012-2017 Generalization The information obtained allowed us to obtain a number of indicators.

Table A.1 - Reflection in the procedural documents of the results of the audit compliance by the operational-search authorities with the requirements of the Federal Law "On operational-search activity" at the pre-trial stage of the criminal legal proceedings

	% of total number of cases
There is only a general indication that the ORM comply with the requirements of the Federal Law on ORD	24%
There is a detailed analysis of the conformity of the produced ORM the requirements of the Federal Law on OSA, indicating the articles of the law and criminal case materials	four%
Missing any instructions	72%

Table A.2 - Reflection in judgments of the results of compliance checks
operational-search bodies of the requirements of the Federal Law "On the operational-search
activity"

	% of total number of cases
There is only a general indication that the ORM comply with the requirements of the Federal Law on ORD	67%
There is a detailed analysis of the conformity of the produced ORM the requirements of the Federal Law on OSA, indicating the articles of the law and criminal case materials	31%
Missing any instructions	2%

Table A.3 - Stages of the criminal process at which
eliminate violations associated with the use of results promptly
search activity in proving in criminal cases

	% of total number of cases
Stage of initiation of a criminal case	0%
Stage of preliminary investigation	0%
In the court of first instance	26%
In the court of appeal, cassation, supervisory instance	74%